

(37,487)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 790

CONCORDIA FIRE INSURANCE COMPANY,
APPELLANT,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

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[fols. 1-3] [Caption omitted]

[fol. 4]

IN CIRCUIT COURT OF COOK COUNTY

No. B-171,526

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

THE CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN

Debt

DECLARATION—Filed Nov. 8, 1928

The People of the State of Illinois, by Robert E. Crowe, State's Attorney, complain of The Concordia Fire Insurance Company of Milwaukee, Wisconsin, defendant, of a plea that the said defendant render to the plaintiffs the sum of $30,140.61, which said defendant owes to and unjustly detains from the plaintiffs; for that the defendant heretofore, to-wit, on, etc., was and still is indebted to the plaintiffs in the sum of $30,140.61 for and on account of general taxes levied and extended against the defendant, and upon the assessment of its personal property in and for the years A. D. 1870 to A. D. 1927, both inclusive, —, which said taxes became and are unpaid and are delinquent. And the plaintiffs aver as follows:

First. That during each of the years ending April 30th, in the years A. D. 1870 to A. D. 1927, both inclusive, the defendant was an insurance company incorporated by the authority of a state or government other than the State of Illinois, to-wit, by the State of Wisconsin, and as such was doing business in the County of Cook and State of Illinois, in pursuance and by the authority of the Act entitled "An Act to incorporate and govern fire, marine and inland navigation insurance companies doing business in the State of Illinois", in force March 11, 1869, and July 1, 1869, as amended by subsequent acts.

Second. That for the purpose of carrying on said business in said County of Cook, said defendant during said respective years established and maintained agencies in the Town of South Chicago, in the City of Chicago, and other taxing districts in said Cook County, and such agencies, through the agents of the defendant conducting the [fol. 5] business of the defendant at said agencies, during each of said years acquired on behalf of the defendant net receipts from the business so conducted, the amounts of which net receipts it became and was the duty of the said agents to return to the proper officer authorized and required by law to receive returns of such net receipts and which net receipts were required to be entered upon the tax lists of said County, Town and City, and be subject to the same rate of taxation for all purposes that other personal property was subject to in said town, City and County.

Third. That the said net receipts for said respective years, were assessed for said respective years by the proper assessing tribunals in said Cook County and in the manner and form required by law, and the County Clerk of said Cook County extended against said assessments taxes amounting to the following sums, respectively:

Against the assessment for the year ending April 30, 1923	5,853 40
Against the assessment for the year ending April 30, 1924	7,019 48
Against the assessment for the year ending April 30, 1925	5,059 58
Against the assessment for the year ending April 30, 1926	6,312 96
Against the assessment for the year ending April 30, 1927	5,805 19

Fourth. That said County Clerk returned the Collector's Warrants for said years for the collection of the taxes for said years to the proper collector as required by law; that said taxes became and are and were returned unpaid and delinquent, and that they are the same taxes herein alleged to be due and owing to the plaintiffs from the defendant. The institution of this suit has been duly authorized by the County Board of Cook County, Illinois.

[fols. 6-18] Fifth. That during said years A. D. 1923 to 1927, inclusive, other assessments of net receipts of the defendant were attempted to be made by the assessing tribunals of said Cook County, and taxes were attempted to be extended against the same, but each and every of said other attempted assessments and the attempted extensions of taxes against the same were and are null and void and uncollectible, and all taxes extended against the net receipts of the defendants for each of the years A. D. 1870 to 1922 inclusive, and not appearing upon the tax books of said county to have been heretofore paid, were illegally extended and were and are null and void.

Wherefore, and by force of the statute in such case made and provided, an action hath accrued to the plaintiffs to have and demand from the defendant the said sum of $30,140.61, yet the defendant, though often requested, hath not paid the said sum of money, nor any part thereof, but fails and refuses so to do, in the damage of the plaintiffs in the sum of $35,000.00; wherefore plaintiffs bring this suit.

(Signed) Robert E. Crowe, State's Attorney. Samuel A. Ettelson, Leon Hornstein, Clair E. More, Louis H. German, Harris F. Williams, Hiram T. Gilbert, of counsel.

[fols. 19–21] In Circuit Court of Cook County

[Title omitted]

Order Withdrawing Demurrer to Pleas—Nov. 21, 1930

This day comes the plaintiff, by John A. Swanson, State's Attorney, and comes the defendant, by Silber, Isaacs, Silber & Woley, its attorneys, and thereupon by agreement of counsel, it is ordered that the demurrer of the plaintiff to the special pleas of the defendant be and the same is hereby withdrawn, and it is stipulated that the defendant shall be at liberty to offer, upon any trial of the above entitled cause under the plea of general issue, any evidence and establish any defense which it might have introduced, offered or established under any form of pleading.

Enter.

Stanley Klarkowski, Judge.

O. K.

John A. Swanson, Hiram T. Gilbert, for Plaintiffs.

[fol. 22] IN CIRCUIT COURT OF COOK COUNTY

No. B 171,526

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

THE CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN

Debt

FINDING AND JUDGMENT—March 21, 1932

This day come the parties to the above entitled cause and by agreement of the parties a trial by jury in said cause is hereby waived and said cause is submitted to the court for trial without a jury. Thereupon the court having heard the evidence and the arguments of counsel and being now fully advised in the premises, the court finds the issues in favor of the defendant and that the defendant is not indebted to the plaintiffs on account of the taxes set forth in the declaration as therein alleged. Whereupon the plaintiffs moved the court to set aside said finding and grant the plaintiffs a new trial in said cause, which motion the court overruled. It is therefore considered by the court that judgment be entered in said cause in favor of the defendant and that the plaintiffs take nothing by their suit.

[fols. 23–23-5] Thereupon the plaintiffs prayed an appeal from said judgment to the Supreme Court of Illinois, which appeal is allowed, and on motion of plaintiffs thirty days is allowed them in which to file a Bill of Exceptions herein.

H. Sterling Pomeroy, Judge.

March 21, 1932.

O. K. as to form.

John A. Swanson, Louis H. Guinan, Hiram T. Gilbert, for Plaintiffs. Silber, Isaacs, Silber & Woley, for Defendant.

[fol. 23-6] IN CIRCUIT COURT OF COOK COUNTY

Abstract of Bill of Exceptions—Filed March 21, 1932

The Court: Which case are you trying?

Mr. Gilbert: Trying all of them.

Mr. Silber: Judge, it is omnibus.

OPENING STATEMENT FOR PLAINTIFFS

This, after setting forth that suits are brought to recover net receipts taxes under Section 30 of the Act of 1869,

gives a history of the litigation under that section commencing with People v. Kent, 300 Ill. 344, and ending with People v. Franklin National Fire Ins. Co., 343 Ill. 336.

In 1924, about the time the Hanover Fire Insurance Company case was brought in the Superior Court of Cook County, an original petition for mandamus was filed in the name of The People of the State of Illinois v. Eugene E. Fayart, et al., in the Supreme Court, the purpose of which, or at least the main purpose, was to secure from the Supreme Court a decision as to how the amount of net receipts was to be ascertained; that is, what deductions on account of expense could properly be made from gross receipts in [fol. 23-7] arriving at the amount of net receipts. The defendants, who were the agents of a foreign fire insurance company, answered the petition, and, among other things, alleged that Section 30 of the Act of 1869 was in violation of the Fourteenth Amendment. That case was heard in the Supreme Court and taken under advisement and remained under advisement until the close of the December Term, 1928.

In the meantime, the two hundred eight actions at law had been brought and negotiations had been entered into between the taxing bodies and the insurance companies for settlements. About December 15, 1928, the attorneys for the respective parties had substantially agreed upon a settlement, subject to the approval of the insurance companies and the taxing bodies. On December 20, however, much to the surprise of all parties concerned, the Supreme Court, in the Fayart case, that is, the mandamus case, handed down a unanimous opinion holding that Section 30 of the Act of 1869 was in violation of the Fourteenth Amendment. It thus overruled its prior decision in the Harding case, 327 Ill. 590.

Upon the filing of the opinion of the Supreme Court in the Fayart case, a petition for a rehearing on behalf of The People of the State of Illinois was filed in which the decision of the court was reviewed at great length. The result was that the Supreme Court regarded the petition for a rehearing as being in violation of the rehearing rule, and for that reason struck it from the files, but immediately after doing so proceeded to grant a rehearing of its own motion. Thereupon the petitioners, The People of the State of Illinois, concluded it would be advisable to dismiss their pe-

[fol. 23-8] tition and made a motion for that purpose, which the court allowed.

Immediately after the dismissal of the petition in the Fayart case, the attorneys for The People of the State of Illinois and those for the insurance companies resumed their negotiations for a settlement. The result of these negotiations was that one hundred ninety of the companies settled their liabilities on the basis of approximately fifty per cent of the total taxes extended against them respectively for the years in question. At the time this settlement was made there was uncertainty as to what would be the ruling of the Supreme Court as to the constitutionality of Section 30 of the Act of 1869 in case the question again came before the court. That uncertainty was the reason for the acquiescence by the taxing bodies in the settlements which were made.

Now, to explain that, the Harding case, in which they finally sustained the constitutionality of the law, in 327 Ill., was a decision by four against three, three of the judges holding the law was unconstitutional. Among the four was Judge Duncan, who in the Fayart case, wrote a forty-page opinion holding that net receipts meant net profits. And so there were three judges in favor of sustaining the law in its entirety, three against it, and Judge Duncan sort of in between, and that was the reason for our dismissing that case and seeking to present the matter in another suit. There was another reason. The Supreme Court of Illinois has some peculiar rules, and one is that upon the granting of a petition for rehearing, the petition stands as the argument for the petitioner, then the other side have a right to file an answer, and the petitioner has a right to reply. [fol. 23-9] Now, the court had decided against the law on points which were not argued at all on either side, and we hadn't any right to file anything, and the other side hadn't any right to file anything, and we did not care to submit the case on the old arguments. That was, I thought, a very good reason for getting out of the court and going at it in a different way.

Opening Statement for Defendant

This sets forth the following claims of the defendant:

During each of the years, 1923 to 1927, inclusive, there had been a return under oath filed by each of the com-

panies with the Board of Assessors and there had been an assessment of the net receipts disclosed by the returns, and these assessments and the taxes were of record as liabilities of the companies. None of these taxes had been paid for. In some of the years 1923 to 1927 there had been two assessments against each company. There had been one by the Board of Assessors and there had been a review by the Board of Review. There had been 50 per cent penalty added by the Board of Review, so that in some years there were three tax assessments pending against the companies on exactly the same property.

In 1927 the Board of Review had notified the companies to appear and they did appear and the Board said the only thing they desired to discuss at that time was the assessments they were to make for 1927, that they were not going to consider the net receipts for 1923 to 1926 until the decision upon the petition for a rehearing then pending and they would let them know when they wanted them again, and they never let them know. The companies knew noth- [fol. 23-10] ing about the assessments until they were sued in 1928. No opportunity was given them to be heard for the five years on so-called omitted net receipts.

The defendants claimed first that the Board of Review had no power in 1928 to make the omitted property assessments when there had already been sworn returns filed and assessments made; second, that the Board had no right to make the assessments without giving the companies an opportunity to be heard, and, third, that the Board had no right to make the assessments upon the work which had been done by a man named Seely, a tax ferret who had a contract for a contingent fee to be collected out of the very taxes he was assisting the Board of Review to assess.

In making the assessments in 1928 the Board of Review did not take 60 per cent or 50 per cent of the full value, but they took 100 per cent of the amount they estimated the net receipts to be upon Seeley's figures and they applied the tax rate against the full 100 per cent.

The court cannot decide how much was actually due for taxation. The taxes are either valid or invalid.

Section 30 of the Act of 1869 is unconstitutional because it provides for taxing the net receipts of foreign fire insurance companies without any law authorizing the taxing of domestic companies, casualty companies, and other com-

panies, on their net receipts from similar business and because domestic companies are permitted to deduct their losses upon their policies and every expense while foreign fire insurance companies are denied the right to deduct their losses and for other reasons to be hereafter given, if necessary.

[fol. 23-11] EVIDENCE FOR PLAINTIFFS

OFFERS IN EVIDENCE

Plaintiffs introduced in evidence five books numbered 143, 144, 145, 146 and 170 proven to constitute a part of the records of the office of the County Clerk of Cook County, Illinois, relating to the assessment of omitted net receipts of foreign fire, marine and inland navigation insurance companies for the years 1923 to 1926, inclusive, and net receipts for the year 1927, together with portions of certain pages containing the assessments of the omitted net receipts of the defendant, the Concordia Fire Insurance Company, for the years 1923 to 1926, inclusive, and its net receipts for the year 1927, and the extensions of taxes thereon, with the collector's warrants and collector's returns for those years showing that the taxes against the company for said years were returned uncollected, and also a condensed statement received by agreement in place of the entries in the books, showing the taxes excluded the total amounts of which were as follows:

State tax	$2,194.90
County tax	2,571.08
Forest preserve tax	497.15
Sanitary District tax	1,923.34
City tax, City of Chicago	10,247.25
School tax	10,195.97
South Park tax	2,492.24
Town tax	0.44
West Park tax	12.03
Old Portage tax	5.54
Norwood Park tax	0.67
Total	$30,146.61

[fol. 23-12] Said condensed statement is as follows:

(Here follows statement, side folio 23-12)

The Concordia Fire Insurance Company of Milwaukee, Wis.

Book, pg., line	Taxing district	Year	Total tax for year	State tax	County tax	Forest preserve tax	Sanitary District Tax	City taxes of city of Chicago	School taxes	South Park tax	Town tax	West Park tax	Old Portage Park tax	Norwood Park tax	Estimate or taxable net receipts of A. D. 2/m, by Board of Review, dollars
143, 6-13	South Chicago	1923	$5,853.40	$370.00	$473.60	$111.00	$303.40	$2,116.40	$2,057.20	$421.80	....	....	....	....	$74,000
144, 29-14	South Chicago	1924	7,019.48	543.18	484.68	108.64	384.40	2,389.96	2,532.02	576.60	....	....	....	....	83,565
145, 31-18	South Chicago	1925	4,980.25	467.76	440.74	77.05	302.67	1,639.90	1,672.92	379.71	....	....	....	....	58,030
145, 14-2	Jefferson	1925	51.56	4.81	4.52	0.80	3.11	16.84	17.18	.....	....	....	4.30	....	565
145, 23-3	Norwood Park	1925	14.90	1.49	1.40	0.25	0.97	5.22	5.32	.....	0.25	....	....	....	175
145, 39-6	West Chicago	1925	12.87	1.19	1.12	0.20	0.77	4.18	4.26	.....	....	1.15	....	....	140
146, 31-17.	South Chicago	1926	6,149.98	430.30	602.42	99.30	430.30	2,038.96	2,005.86	542.84	....	....	....	....	66,200
146, 13-3	Jefferson	1926	16.94	1.21	1.69	0.28	1.21	5.70	5.61	.....	....	....	1.24	....	185
146, 25-2	Norwood Park	1926	12.32	0.88	1.23	0.21	0.88	4.16	4.10	.....	0.19	....	....	0.67	135
146, 39-5	West Chicago	1926	132.72	9.43	13.30	2.18	9.43	44.66	43.94	.....	....	10.88	....	....	1,450
170, 2-20	South Chicago	1927	5,895.19	364.65	546.98	97.24	486.20	1,981.27	1,847.56	571.29	....	....	....	....	121,550
	Total		$30,140.61	$2,194.90	$2,571.08	$487.15	$1,923.34	$10,247.25	$10,195.97	$2,492.24	0.44	12.03	5.54	0.67	

Plaintiff rests.

[fol. 23-13] Objection by defendant and motion to find for defendant the objection not to the summary and not to the process of shortening the proof that is offered, but on the ground that the books from which these entries are made are not books required to be kept by the county clerk or county collector, but are books made up especially for this particular assessment and to show these particular facts and that the evidence therefore is not competent.

Motion denied.

EVIDENCE FOR DEFENDANT.

CHARLES KRUTCKOFF, called for defendant, testified as follows:

Direct examination:

I reside at 5000 East End avenue, Chicago, Illinois. Have resided in Chicago all my life. At present am a member of the State Tax Commission. From 1915 to 1927 I was a member of the Cook County Board of Assessors. I was chairman of the Board in 1926 and 1927. While I was a member of the Board it received returns under oath from various foreign stock fire insurance companies in most all cases, and the Board of Assessors annually made assessments of their net receipts upon the basis of their returns.

During that time there was a custom to take around 60 per cent of full value in making assessments of property.

In other words, to illustrate: If I had a piece of property, real estate, worth $100,000 on the market the As-[fol. 23-14] sessor, in fixing the market value of that would assume that it was worth $60,000 or $70,000 and no more. Then they would apply the assessed valuation statute, whatever it might be, 50 per cent or 33 per cent given to that value. Then the tax rate would be applied to that final assessed value. The same rule applied to personal property, whether it was tangible or intangible. That was done to secure constitutional uniformity of taxation as near as possible. The Supreme Court of Illinois sustained the 60 per cent basis.

In the case of insurance companies we accepted their returns as they returned them deducting their expenses, as shown on their returns. We took 60 per cent of the amount returned by the insurance company, then took one-half of

the 60 per cent, which really made 30 per cent of the amount of their return, which was assessed.

Cross-examination:

This ratio of the debasement varied from time to time. They tried to come as near as possible to 60 per cent or 70 per cent. In some years it was as low as 50 per cent. It was never more than 70 per cent. The debasement started in 1899. I was then an employee of the Board of Assessors. I was chief clerk for 15 or 20 years.

Redirect examination:

During the period from 1899 until now the general custom we have been talking about prevailed:

[fol. 23-15] HERMAN B. SEELY, called for defendant, testified as follows:

Direct examination:

My name is Herman B. Seely. Reside at 718 East 89th place, Chicago. Have lived in Chicago since 1885. For a long time I practiced architecture. From 1920 to 1930 I was connected with this insurance litigation. In 1916 or 1917 I was investigating for Rufus M. Potts, Insurance Superintendent. He wanted to know what the losses were for four or five years.

Ralph R. Bradley obtained a contract from the City of Chicago and I had an interest in it. It was a contingent contract. That contract provided for a contingent fee of 30 per cent on net receipts up to 1918 and after that 15 per cent. I had a one-third interest in that. Bradley had a contract with the South Park Board which they refused to recognize because it was champertous.

There was a contract obtained by Bulkley, More & Tallmadge from the county that I did not know of until 1928. I claimed an interest in it which was finally recognized. I had no interest in any matters under the Chicago contract after 1922. I was then employed by the City of Chicago at $200 a month. I was employed to gather information for use by the Board of Review in making these assessments of

net receipts. I was working on the assessments that were being made by the Board of Review on net receipts. I knew the Board of Assessors and the Board of Review were actually making assessments in each of the years 1923 to 1927.

[fol. 23-16] After the Board of Assessors entered on the books the full amount of the net receipts as returned to them by the companies for net receipts and in cases where no return was made, they made an estimate with penalty. In 1924 they made two assessments. One of them was the net receipts entered in the book which set up that they were net receipts and they took the returns that were made to them by the companies and entered the full amounts. In the other they entered the same amount under the heading "Credits." Whatever name they gave it they were actually assessing the same net receipts.

In 1925 and 1926 they made only the assessments on the separate books as I recall it, i. e., on the returns of the company. They made no entries in the regular books.

1925 and 1926 were done that way. There was a special book gotten up for these years. I think it was called net receipts of foreign insurance companies. It contained only the returns of the net receipts that they had made.

In 1927 there were two assessments. There was an assessment of net receipts made by the Board of Review in a separate book in accordance with the final decision in the Hanover case. Then there was an assessment under the heading "credits" in the regular book, i. e., the personal property book.

I raised the question with Mr. Barrett and he had the book brought in. I protested against his making an assessment of that kind. He had the book brought in to him, examined it, and he said there was no net receipt in here, [fol. 23-17] this was credits and he ordered the assessment then to be confirmed as made by the Assessors in that book. That is what happened.

Every year from 1923 to 1927, before the final omitted net receipts assessment was made for the five years in 1928, there was at least one and in some years two assessments against net receipts of each of these companies.

The two assessments on 1927 were current and not omitted net receipts.

I prepared the figures for the omitted receipts assessments that were made in 1928 for the five years. I made up slips for them. I have the figures right here.

I received $12,000 from the Bradley contract and $4,000 from the other contract.

If the money is collected in these cases I will get some out of the County, but none from the City.

I had no right or interest in the Bradley contract beyond 1922 until the settlement was made.

The fund from which I got this compensation was a fund produced by settlement with a number of companies. That included the taxes for the years 1923-1927. That waived any payment at all upon back taxes from 1869 to 1923. That is the reason I got the settlement from Bradley.

During this period from 1922 to 1928 when I was working for the City of Chicago I would work in the Board of Review on that particular thing. They would accept what I would decide ought to be done. That is the Board of Review did.

At the hearing before the Board of Review in December, 1927, it was stated on our side that we had estimated that [fol. 23-18] the gross returns made by the companies on their own forms were equivalent to 75 per cent of what would be shown if they had put them on Form 16. That was our contention.

The Board of Review adopted that and directed that the gross receipts should be used as the basis, so that these figures in this National are all taken from the returns that you made, using the gross receipts and not the net receipts and then the Board of Review had decided that they would allow only 30 per cent deduction for expenses because they limited that merely to the commissions of the agents and the local taxes paid and that was taken as equivalent to 30 per cent for Class 1 agents, averaging all business, and 25 per cent for the outlying agents. On that basis it was made up. We took your return of gross receipts as you made them and took from it 30 per cent in the case of your Class 1 agent, and that was the great bulk of it. Many of them showed only Class 1 agencies. Where they showed outlying ones we took off 25 per cent for expenses and where they showed outlying towns that was not put into the asses-ment at all, because no assessments were made for the outlying towns.

The member of the Board of Review I took this matter up with was Mr. Barrett. He had that matter in charge. They turned this matter over to Mr. Barrett. Mr. Barrett was one member of the three members I have said I reported to what I thought was the right basis and he adopted it. That basis of allowance for the amount of expenses to be deducted had been adopted during the prior years.

Of the figures that I got up they were taken from the annual statement of all business done in Illinois as filed by [fol. 23-19] the companies with the Insurance Department at Springfield only in a case where there was no return made by the company at all or where we could not find any trace of any return having been made that we could use. We took the gross receipts as they returned them and allowed them thirty per cent for expenses on the great bulk of the assessment. We didn't pay any attention really to the amount of expenses that they deducted in determining their net receipts as returned by them under oath because there was this difference. The Board of Review under the writ in the Barrett case could not take into account the overhead expenses. They were limited to the expenses shown on the face of Form No. 16. There was an order to the Tax Commission in effect.

That was their interpretation of what they had to do under the writ, and that was enforced also by the Tax Commission. That was the interpretation of the attorney for the Board, Massena.

If the companies returned $150,000 premium receipts and showed against that $60,000 of actual expenses of their agency including the expenses, overhead, etc.; and left $90,000 of the net receipts to be assessed I took thirty per cent off of that $150,000.

We took those gross receipts and we took off thirty per cent for expenses. We took off nothing for equalization. The balance was what we construed to be the net receipts. There were no estimates made unless we were compelled to by the absence of a return. There were very few cases where they had not made any returns. I had them in the shape of copies I have made. I had access to the originals. [fol. 23-20] I made every endeavor I could to get the returns as actually made of the gross receipts. As to 1923 we had no record of the gross receipts. The companies had

refused to make returns to the Board of Review. They made their returns to the Board of Assessors on personal property blanks. In making 1923 we did use the State returns. When we found what was made up in 1924, not having the gross receipts in any form for 1923, I would compare the total business for the year on which 1924 was based with that of 1923. If there was less in 1923 than 1924 I used the 1924 assessment and took off say ten per cent whatever it showed or fifteen. If there was more it was added. But it was there based on the State returns.

I was not in the actual employ of the Board of Assessors or the Board of Review during any of this period.

I do not recognize these working slips for 1923. I never worked with them. They would show what assessment was made by the Assessor, but because they did not show gross receipts I could not use them. I don't know who made those up, except that I knew the custom in the Board of Review to go through the books and make slips like that.

When I estimated in the absence of a return I had to use the annual statement made by the companies under the law to the insurance department of all the business in Illinois, and then I had to more or less guess at what amount of that total of business was in Cook County. It showed all the business of the State of Illinois.

[fol. 23-21] Cross-examination:

I was to get one-third of the Bradley contingent fee for the years prior to 1923 and did not have any contract that I know of for the years 1923-1927, but Bradley gave me $12,000 in consideration of the fact that I had rendered service previously and the fact that I had a claim because when the settlement was made, and all of my interests were wiped out, I was entitled to consideration.

In 1920 the Tax Commission issued a form to be used by the companies in making their returns of net receipts for this tax and it was called Tax Commission Form 16. That was the form that the Tax Commission required all these companies to make their returns on and it was also required by the writ handed down. They refused to make their returns on that form. They took the position before the Board of Review that they were not obliged to make any return on Form 16 and that the Board could do nothing except to accept the return.

ALMA N. RASMUSSEN, called for defendant, testified as follows:

Direct examination:

My name is Alma N. Rasmussen. I live at 6116 Kenwood avenue, Chicago. During 1925, '26, and '27 I was in charge of the Accounting Dept. of Brummel Bros., Cook County manager for the Albany Insurance Co., Eureka Security Fire & Marine Insurance Co., Globe Insurance Co., Reliable Fire Insurance Co. of Dayton, Security Fire Insurance [fol. 23-22] Company of Davenport, Iowa, and the United American Insurance Company.

I personally prepared for them for the years 1925, 1926, and 1927 for each of the six companies and filed them with the Board of Assessors.

The Albany Company for the year 1925 reported and filed net receipts $33,299.02, for 1926 net receipts $32,288.58, for 1927 net receipts $27,559.26. The Eureka Security Co. for the year 1925 filed net receipts $7,387.95, for the year 1926 $18,023.09, for 1927 $25,023.12. The Globe Insurance Company for the year 1925 filed net receipts $34,558.74, for 1926 net receipts $33,442.12, for 1927 net receipts $35,844.84. The Reliable Ins. Co. for the year 1925 filed net receipts $26,108.61, for the year 1926 net receipts $25,246.29, for the year 1927 net receipts $27,897.83. The Security Fire Ins. Co. of Davenport for the year 1925 filed net receipts $33,698.07, for the year 1926 net receipts $36,587.37, for the year 1927 net receipts $39,216.28. The United American Ins. Co. for the year 1925 filed net receipts $19,656.98, for the year 1926 net receipts $19,347.66, for the year 1927 net receipts $19,895.89.

I took receipts for those returns from Mr. Paul Wiedel, Chief Clerk of the Board of Assessors. These are photostatic copies of those receipts, for the year 1927 the receipt was signed by John Hora. I took a receipt each year for each of the six companies filed.

In 1925 Brummel Bros. were Cook County agents for The National Ben Franklin Insurance Co. I made a return for that company as shown by receipt of May 28, 1925, showing net receipts of $39,709.86.

[fol. 23-23] During the year- 1925, '26, and '27 these insurance companies had only net receipts and no other prop-

erty in Cook County. The assessment was therefore only on the net receipts.

Cross-examination:

In making our return of net receipts, we put on our return the gross receipts and total expenses. We did not itemize the expenses. Our returns did not show what the expenses included. That could be ascertained only by reference to the books of Brummel Bros.; they showed all expenses. We had no receipts except premiums. When the Board of Review got our returns all they had was our statement of receipts and expenses substantiated by the books of the company. We received the blanks from the county to make return on Form 16.

Henry Schaefer, called by defendant, testified as follows:

Direct examination:

My name is Henry Schaefer. I live at 321 N. Menard avenue. At present my business is soliciting fire insurance. I was with Brummel Bros. during 1923 and 1924.

I took part in preparing and filing net receipts for the six named insurance companies. The Albany Insurance Company for the year 1923 filed net receipts of $53,946.54, for the year 1924 net receipts of $57,116.39. The Eureka Security Company were not represented in those years by Brummel Bros. The Globe Insurance Company for the year 1923 filed net receipts $59,617.44, for the year 1924 [fol. 23-24] net receipts $63,041.76. The Reliable Ins. Co. for the year 1923 filed net receipts $37,561.47, for the year 1924 filed net receipts $43,540.65. The Security Co. of Davenport for the year 1923 filed net receipts $47,035.64, for the year 1924 net receipts $54,995.88. The United American Ins. Co. for the year 1924 filed net receipts $17,434.11. Brummel Bros. did not represent them in 1923. These returns were filed by me for those years and for those companies with the Board of Assessors. Later we got back bills for those years. They were not paid and they are still unpaid. These companies had no other property except the net receipts shown during those periods.

Cross-examination:

I never heard of Form 16. I never got a copy of it.

The Witness: I made up my statement of net receipts from the total premiums on fire insurance. I included nothing else. They simply wrote fire insurance. My return did not show the kind of insurance, nor what the items of expense were.

My statement simply showed so much gross and so much net. The returns were sworn to for each company. We wrote mostly fire insurance and some automobile insurance and we only included fire insurance premiums in the gross receipts. I don't recall that we wrote any insurance besides fire and automobile.

[fols. 23-25] W. H. ROADIFER, called for defendants, testified as follows:

Direct examination:

I reside at 7540 East End avenue, Chicago, and am comptroller of the National Fire Insurance Company of Hartford and all of the other companies included in that fleet, including the Mechanics and Traders, the Transcontinental and the Franklin National. I have been with the National Fire Insurance Company of Hartford for forty years. I had charge of the filing of returns of net receipts for Cook County and prepared and filed during each of the years from 1923 to 1927, inclusive, for the National Fire Insurance Company of Hartford and for the Mechanics and Traders Insurance Company, reports of net receipts under oath with the Board of Assessors. The returns of the net receipts for the National Fire Insurance Company of Hartford were as follows: 1923, $354,950; 1924, $340,759; 1925, $340,203; 1926, $378,489; 1927, $378,782. For the Mechanics and Traders Insurance Company of New Orleans the returns were, for 1923, $14,473; 1924, $40,988; 1925, $47,640; 1926, $72,043; 1927 $46,241. These returns were all made under oath and were all filed with the Board of Assessors of Cook County in those respective years.

The National Fire Insurance Company also had some physical personal property in Cook County upon which a separate return was made and upon which a tax has been paid. Outside of the physical personal property and the net receipts the company had no other property of any kind in Cook County at that time.

[fols. 23-26] Cross-examination:

In my returns of gross receipts I included fire, marine and inland navigation and by fire we included fire underwritten coverage. No other receipts were included.

Edward R. Litsinger, called for defendant, testified as follows:

Direct examination:

I am an attorney-at-law and a member of the Board of Review of Cook County and have been since January 1, 1917. During that period I have been chairman of the Board part of the time. Some time between the years 1923 to 1928 there was a proceeding pending before the Board with reference to taxing on omitted premium receipts—I can't remember the exact dates. In a general way, all I can say about the matter is that it was a long controversy relating to the assessments against property or receipts of non-resident fire insurance companies, which led to mandamus suits, and I think it went to the Supreme Court. I don't know but what it even went to the United States Supreme Court, on the question, as I recall, whether foreign insurance companies, fire insurance companies, would have to pay based on their net premium receipts. We understood that the Supreme Court finally settled the question and then the matter of assessing the insurance companies for back years came up and on those matters there were hearings as to the form, as to the manner of arriving at the net receipts, and so forth.

[fol. 23-27] I knew that complaints had been filed against insurance companies, and I knew that Mr. Seeley was connected in some respects with the Corporation Counsel's office, in whatever way it was I don't know, but I under-

stood that Mr. Seeley had prepared a schedule of figures in connection with the premium receipts, and then it is the practice of the Board of Review, on a complaint being submitted, to notify the insurance companies or property owners, or whoever should be assessed, that a complaint had been filed and giving a five days' notice of the filing of that complaint to be set for hearing. Then the matter comes up for hearing.

When these matters came up for hearing on the complaints Mr. Seeley was a witness and had furnished information, and as a defense to those complaints their attorneys appeared. I couldn't say that I knew at the time that these assessments were spread for the so-called omitted net receipts that Mr. Seeley, who prepared the figures and whose figures were adopted by the Board of Review, was working on a contingent fee basis for the collection of the very taxes that were spread. I don't know that I have any reason to believe that he was working on a contingent fee basis. I knew he came through the Corporation Counsel's office.

The only contact I had with this insurance tax matter was official and the official contact was that we heard all these matters, which took up a large amount of time of the Board of Review, on the questions of law first, and there were many very conflicting and involved legal questions involved. It went to the Supreme Court and afterwards to [fol. 23-28] the United States Supreme Court. It was so important that Chief Justice Hughes was one of the counsel in the case. It came back to the Board of Review on the finding of those courts and then it came up for the assessment, fixing of the assessment, and those various phases.

The law provides that all property, personal and real, should be taxed on its full fair cash market value; however, that was never done. It was regarded as kind of official that 60 per cent of the actual value should be taken as the assessed value to start with. The assessors and the Board of Review fixed a full, fair, cash, market value and then stopped. The law provided that property should not be taxed on its full, fair, cash, market value, and the assessors or the Board of Review were supposed to fix it, and that supposedly was 60 per cent, but the law provided that the taxes should be figured at a percentage of that.

The tax rate was applied. So, at one time it was applied to one-fifth, at another time it was changed to one-third, and then changed to one-half. That had to do with the bonding figure and had to do with the whole, so that the percentage on which the tax was levied by the assessors, had nothing to do with that and the Board of Review had nothing to do with that. All that they were interested in was the supposed full, fair, cash market value. When the order of reassessment came about the full selling value was ascertained in the following supposed scientific way: A lot would be measured off by its number of feet—one foot wide and so many feet deep, and a building was measured off into a square of cubical contents, and by that method called scientific, a building and a lot would be valued sup- [fol. 23-29] posedly at the fair market value. That system was adopted in 1928. Then the assessors, through the assistance of men who were supposed to be authorities, adopted a factor of 37 per cent, which was supposed to be the factor applying all over the state, and which was applied as follows: Property valued at $1,000, for instance, was debased to 37 per cent, and then 5 or 6 per cent taxes of 37 per cent were taken. This was the method of assessment used by the Tax Commission and it has been followed since 1928.

This system is supposed to make for uniformity, but whether it can make a legal value or not, nobody can tell. We may take, for example, a block of bungalows all built practically alike, and all costing $10,000 in 1925, and sold for that figure, and measure up so that the land, and the building would be worth $10,000. Then, in 1927 or 1928, the owner of one piece in the block wants to get rid of it and it is advertised for sale. The best bid that the owner receives is $5,000, which shows that the aforesaid scientific basis might be all right for a building down here where it might not be all right for bungalows out in the field.

I have always maintained that the small home, where there is no income and where you can't determine the value, should not be treated with the same precise rule of thumb or scientific method as the building that maintains its approximate full commercial value. I believe this is the cause of the situation that has created this desperate hardship. Take a man, for instance, who would buy a piece of

property, the general level of assessed value of which was [fol. 23-30] around from 25 to 30 per cent, and perhaps pay $10,000 for it. The real estate agent would tell him that the taxes would probably be on a basis of 2 per cent or less than that, or $200 per year. Knowing about the amount of tax, the returns and percentages, the purchaser figures that that amount is going to be the tax from year to year. When this so-called scientific method was applied, it took this property from 25 per cent of its full value to 37 per cent of its full value, and it raised him 25 per cent, 30 per cent, or in some cases 40 per cent. Naturally, this man felt this increase greatly, and the result was that he either couldn't pay or didn't want to pay; that is your outcome and your tax problem.

Cross-examination:

The tax against those 208 insurance companies before the Board is extended upon an assessment of their net receipts. Their net receipts are obtainable by extending the total amount of their gross premiums and deducting expenses. It wouldn't be possible for the Board of Review to go into a detailed examination of the receipts and expenses of 208 insurance companies. The Board has to take the best estimate it can.

Redirect examination:

I cannot tell you precisely whether or not each company filed a sworn return with the Board of Review each year and whether or not there is a record of an assessment each year on the returns that were submitted by each company, but I can tell you that the practice is and the custom is [fol. 23-31] that the assessors send their records to us and we take the records. If we have a record of an assessment against you of $5,000 and a complaint is made that you have one million instead of five thousand, we originate our own complaint and then we hear your matter, independently of the assessors' figures, and determine then as a new matter whether you should be assessed on $5,000 or $5,000,000.

Where the books show the letter "R" in connection with an assessment, it means on a return that might have been a sworn return or a signed return without being sworn;

and where the letter "E" appears that means if the company didn't file any return at all or make any record with the assessors, then the assessment is estimated against it. A sworn return may be incomplete, there may be omitted property, and in many cases there is. In many cases a sworn return is on a schedule of $50,000 of all personal property, and we don't know whether or not it is actual.

For illustration, if in 1923 an assessment was entered against net receipts of the A. B. Insurance Company of $100,000, and in 1928, five years later, on a complaint, or otherwise, a new assessment was made which was called "Omitted net receipts," although this was already assessed in 1923, I should say, depending upon a reported $100,000, and then under this ruling, the amount should have been $200,000. I think that if a new assessment was made for $200,000, it would abrogate the $100,000 assessment. I don't presume that the Board would have intended to make a double assessment on your people at all. If there was omitted proprty, we would assess the omitted [fol. 23-32] property. There isn't any time, no matter how long may have elapsed, when the Board can't call a revaluation of that class of property an assessment of omitted property. In other words, all it amounts to is a revaluation.

Recross-examination:

I believe that the Tax Commission in this state prescribed a form of return for the foreign fire insurance companies, or required them to make it—Form 16, I believe, although I am not sure. Here is a form that shows so much gross receipts and so much net receipts, but gives no information whatever as to how they arrive at the gross or the net. If we accepted this return as true, there wouldn't be any further investigation.

Redirect examination:

I couldn't tell you the degree of investigation that the Board gave Mr. Seeley's figures that they used as an estimate. The Board had no interest in Mr. Seeley; but it did have an interest in getting information that was accurate. The Board would give the insurance companies upon a complaint, the opportunity and privilege to submit any-

thing that they wanted. The insurance companies or any property owner is not foreclosed by anything that Mr. Seeley or anyone else would say.

[fol. 23-33] CHARLES V. BARRETT, called for defendant, testified as follows:

Direct examination:

I am an attorney at law and a member of the Board of Review, and was from 1923 to 1928, inclusive. I am now chairman of the Board and was chairman in 1919 and 1920 and then again around 1926.

During the years 1923 to 1927, inclusive, the matter of so-called omitted net receipts of certain foreign stock fire insurance companies came up before the Board and some complaints were filed by some of the municipalities.

Mr. Herman Seeley, I remember in a general way, gathered certain information with respect to an estimate on the net receipts of the foreign companies for those years and presented them to the Board of Review, which adopted those figures and spread them in 1928 as assessments for the years of 1923 to 1927, inclusive. I supposed that Mr. Seeley represented the City and some sort of a communication to that effect came from the Corporation Counsel's office; that is all I know concerning Mr. Seeley and the tax matter. I knew nothing about any contract he may have had for compensation.

My recollection is that in the years 1923 to 1927, inclusive, certain returns were made to the Board of Assessors by the insurance companies, and were spread as personal property assessments. There was a demand made by the Board of Review on these various companies who were to be assessed to file a return with us on Form 16, as required [fol. 23-34] by the State Tax Commission. There was a refusal of nearly all the companies to file a return on this particular form. In view of that attitude, we were furnished with the information necessary to take action or determine our course by the Corporation Counsel's office through Mr. Seeley and a couple of lawyers representing the City. My recollection is we then took this information, the best information we could get, and spread it on a

specially prepared warrant book which we called "An assessment on the net receipts," as this assessment was spread under a special statute. I think the opinion of the Board was at this time that this was not a personal property assessment such as an assessment against stocks and bonds, etc., but was an assessment under the insurance statute and that we should have a specially prepared warrant, which I think was prepared at that time.

The question came up at that time as to whether or not this was a double assessment, but my opinion was that it wasn't a personal property assessment but an assessment only on net receipts, as per the provision of the statute, and therefore couldn't be considered a double assessment.

We knew at the time that there had been spread on the record for those previous years an assessment against the companies for personal property. I don't know whether or not this assessment was on net receipts; all that we had before us was the record, but my recollection is that it was merely spread as personal property. I think 1928 was the first year that we changed the warrants to indicate that it was specially on net receipts.

[fol. 23-35] I don't remember whether or not in 1928 we did anything towards debasing or reducing the net receipts to 60 per cent of the figure submitted or took the figures that he submitted.

I can only give you my recollection. I think I said at the time that I was of opinion then, it not being a revenue statute, but a special tax on net receipts, in a statute entirely distinct from the revenue statutes, that you were assessable on the whole and that it was not to be considered personal property. That was my personal opinion as a lawyer.

I can only give you my recollection of the impression I have now. The thing would come to us on several occasions. So far as I was personally concerned I was anxious to have it litigated and determined positively for all time so we would have no more trouble with it. We were not able to litigate it, but we could give you an opportunity to take it into court and we understood that at the time. What we did at the time was to make a decision so far as we were concerned which could be made the basis of litigation to positively and definitely determine the situation after that time so that we would have no more trouble with it.

I believe Mr. Seeley requested me as a member of the Board of Review to wipe out the assessment against the so-called personal property, that was on net receipts for those previous years and that I declined to do this. It may be true that I stated that the matter should go into court and the court should decide it.

I think that the procedure in the Board of Review was to adopt the figures he submitted in 1928 without change. [fol. 23-36] I did in fact tell Mr. Louer, who was acting with the Chief Clerk, to spread those assessments in that special book for those years.

We had a special warrant printed which was different from the years before, especially on omitted net receipts, or net receipts under the particular statute that this was assessed on. At the time I considered, and so did the Board, that it was not strictly personal property, that it shouldn't be assessed as personal property, and in order to have the matter come to a head, we took the best information available and spread it of record, under the special heading.

There was some talk at the time of this being a double assessment. I myself considered that it couldn't be a double assessment, because one was personal property and one net receipts.

That matter could be litigated and determined properly.

Cross-examination:

Originally these net receipts were assessed on a personal property assessment book, in the same way that other personal property was assessed, and debased and divided by five, two or three. Then in 1921, the Supreme Court decided that net receipts were not personal property, and the tax was not a personal property tax, but was a business tax and that the tax must be extended on the full amount of the net receipts. Then a mandamus proceeding was commenced against the Board of Review and it was brought by the taxing bodies to require the Board to make the assess- [fol. 23-37] ment on Form 16. As a result of that litigation we began in 1923 to take the full amount of the net receipts as the companies returned them and assess them at the full amount, without any debasement or division, following the Supreme Court's decision. Then the companies in 1924 contended that that was in violation of the

14th Amendment and filed bills in the Superior Court and enjoined the collection of the tax on that ground. The Superior Court and the Supreme Court of Illinois sustained the tax, and then the case went to the Supreme Court of the United States. The Supreme Court of the United States reversed the judgment on the ground that the 14th Amendment would be violated if the tax was extended upon the full amount of net receipts, and that it must be extended as other personal property was extended to be valid. Then it went back to the Supreme Court of Illinois, which recalled its prior decisions which held that the tax was a business tax, and went back to the original holding that this was a personal property tax and held that the net receipts must be assessed just as other personal property.

During these years, 1923 to 1926, inclusive, while this litigation was pending the net receipts were assessed on the full amount, without debasement or division. After the decision in the case, Hanover Fire Insurance Company vs. Harding, they went back to the old scheme of personal property assessment and these insurance companies were notified by the Board of Review to make returns on Form 16, not only for 1927, but for prior years. Then you all appeared before us, Hornstein and Gilbert representing the city and Silber and Folonie representing the insurance companies. The hearings were commenced on December [fol. 23-38] 15, 1927. In the meantime a petition for a rehearing had been filed by the insurance companies and that had not been decided. There was another hearing on the 16th and then we adjourned to await the decision of the Supreme Court on the rehearing and that rehearing was denied December 20, 1927. And then we had another meeting on December 28th, which was a meeting at which Silber and Folonie did not appear but Mr. Levin and Mr. Heinecke from Folonie's office did appear. Then we proceeded to make the assessments on the best information we could get.

WILLIAM H. WEBER, called for defendant, testified as follows:

Direct examination:

I was a member of the Board of Review of Cook County from January 1, 1925, to December 31, 1930, and was a member of the Board at the time these assessments on so-called omitted net receipts for 1923 to 1927, inclusive, were spread; however, Mr. Barrett took up the matter of the insurance and I joined in after he had completed that assessment.

I know Mr. Herman Seeley but did not know at the time that these net receipts were spread on the assessments that he had a contingent interest in the results of the work.

I had no direct contact in fixing the amount of the receipts recommended; that was done under the direction of Mr. Barrett.

[fol. 23-39] STIPULATION

Stipulation showing as to each of the 17 insurance companies the amount of its returns of net receipts for each of the years 1923-1927, inclusive; the amount of the omitted net receipts assessment for each of the years 1923-1926 and the amount of the net receipts assessment made for the year 1927; the tax extended for each of the years on the Board of Review's assessment, and what would have been the amount of the tax if extended on the return of the company debased to 30% for the years 1923 to 1926, inclusive, and to 60% for the year 1927.

The figures as to the defendant, the Concordia Insurance Company, are as follows:

Albany Insurance Company

1923

Return made by the company	$27,512.73
Assessed by Board of Review as estimated "omitted net receipts"	19,250.00
Tax extended on Board of Review assessment	1,522.69
Amount of tax if extended on 30% return	652.86

1924

Return made by the company	29,154.85
Assessed by Board of Review as estimated "omitted net receipts"	20,010.00
Tax extended on Board of Review assessment	1,680.87
Amount of tax if extended on 30% of return	840.00

[fol. 23-40] 1925

Return made by the company	33,299.02
Assessed by Board of Review as estimated "omitted net receipts"	22,850.00
Tax extended on Board of Review assessment	2,067.94
Amount of tax if extended on 30% of return	900.00

1926

Return made by the company	32,288.58
Assessed by Board of Review as estimated "omitted net receipts"	22,160.00
Tax extended on Board of Review assessment	2,058.68
Amount of tax extended on 30% of return	900.00

1927

Return made by the company	27,559.00
Assessed by Board of Review as estimated "omitted net receipts"	37,830.00
Tax extended on Board of Review assessment	1,834.78
Amount of tax if extended on 60% of the amount of company return	800.00
Total taxes on Board of Review assessments	$9,164.96
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	4,092.86

[fol. 23-41] Concordia Fire Insurance Company

1923

Return made by the company	$85,926.00
Assessed by Board of Review as estimated "omitted net receipts"	74,000.00
Tax extended on Board of Review assessment	5,853.40
Amount of tax if extended on 30 per cent of return	2,017.00

1924

Return made by the company	139,035.00
Assessed by Board of Review as estimated "omitted net receipts"	83,565.00
Tax extended on Board of Review assessment	7,019.48
Amount of tax if extended on 30% of return	3,528.00

1925

Return made by the company	153,315.00
Assessed by Board of Review as estimated "omitted net receipts"	55,910.00
Tax extended on Board of Review assessment	5,059.58
Amount of tax if extended on 30% of return	4,072.00

1926

Return made by the company	96,853.00
Assessed by Board of Review as estimated "omitted net receipts"	67,970.00
Tax extended on Board of Review assessment	6,312.96
Amount of tax if extended on 30% of return	2,694.00

[fol. 23-42]

1927

Return made by the company	76,291.00
Assessed by Board of Review as estimated "omitted net receipts"	121,550.00
Tax extended on Board of Review assessment	5,895.19
Amount of tax if extended upon 60% of the amount of company return	2,220.00
Total taxes on Board of Review Assessments	30,140.61
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	14,531.00

Dubuque Fire and Marine Insurance Company

1923

Return made by the company	$96,227.00
Assessed by Board of Review as estimated "omitted net receipts"	129,000.00
Tax extended on Board of Review assessment	9,439.90
Amount of tax if extended on 30% of return	2,282.00

1924

Return made by the company	131,218.68
Assessed by Board of Review as estimated "omitted net receipts"	126,000.00
Tax extended on Board of Review assessment	10,611.07
Amount of tax if extended on 30% of return	3,301.00

[fol. 23-43]

1925

Return made by the company	239,524.00
Assessed by Board of Review as estimated "omitted net receipts"	147,648.00
Tax extended on Board of Review assessment	13,396.84
Amount of tax if extended on 30% of return	6,811.00

1926

Return made by the company	174,527.63
Assessed by Board of Review as estimated "omitted net receipts"	139,035.00
Tax extended on Board of Review assessment	12,659.95
Amount of tax if extended on 30% of return	4,849.00

1927

Return made by the company	177,864.10
Assessed by Board of Review as estimated "omitted net receipts"	265,110.00
Tax extended on Board of Review assessment	12,866.25
Amount of tax if extended upon 60% of the amount of company return	5,141.00
Total taxes on Board of Review assessments	58,974.01
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	22,384.00

[fol. 23-44] Eureka Security Fire and Marine Insurance Company

1923

Return made by the company	$17,846.00
Assessed by Board of Review as estimated "omitted net receipts"	9,500.00
Tax extended on Board of Review assessment	751.45
Amount of tax if extended on 30% of return	419.00

1924

Return made by the company	19,922.51
Assessed by Board of Review as estimated "omitted net receipts"	10,000.00
Tax extended on Board of Review assessment	840.00
Amount of tax if extended on 30% of return	504.00

1925

Return made by the company	7,387.95
Assessed by Board of Review as estimated "omitted net receipts"	12,070.00
Tax extended on Board of Review assessment	1,092.36
Amount of tax if extended on 30% of return	190.00

1926

Return made by the company	18,023.09
Assessed by Board of Review as estimated "omitted net receipts"	20,780.00
Tax extended on Board of Review assessment	1,930.48
Amount of tax if extended on 30% of return	501.00

[fol. 23-45]

1927

Return made by the company	25,023.12
Assessed by Board of Review as estimated "omitted net receipts"	34,350.00
Tax extended on Board of Review assessment	1,665.99
Amount of tax if extended upon 60% of the amount of company return	727.00
Total taxes on Board of Review assessments	$6,280.28
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	2,341.00

Firemen's Insurance Company

1923

Return made by the company	$37,993.00
Assessed by Board of Review as estimated "omitted net receipts"	36,500.00
Tax extended on Board of Review assessment	2,887.15
Amount of tax if extended on 30% of return	893.00

1924

Return made by the company	54,209.00
Assessed by Board of Review as estimated "omitted net receipts"	35,190.00
Tax extended on Board of Review assessment	2,956.00
Amount of tax if extended on 30% of return	1,360.00

[fol. 23-46]

1925

Return made by the company	58,586.00
Assessed by Board of Review as estimated "omitted net receipts"	44,985.00
Tax extended on Board of Review assessment	4,071.17
Amount of tax if extended on 30% of return	1,601.00

1926

Return made by the company	77,591.00
Assessed by Board of Review as estimated "omitted net receipts"	57,300.00
Tax extended on Board of Review assessment	5,233.17
Amount of tax if extended on 30% of return	2,155.00

1927

Return made by the company	111,615.00
Assessed by Board of Review as estimated "omitted net receipts"	154,770.00
Tax extended on Board of Review assessment	7,506.37
Amount of tax if extended upon 60% of the amount of company return	3,204.70
Total taxes on Board of Review assessments	$22,653.86
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	9,213.70

[fol. 23-47] Girard Fire and Marine Insurance Company

1923

Return made by the company	$14,902.00
Assessed by Board of Review as estimated "omitted net receipts"	13,500.00
Tax extended on Board of Review assessment	1,067.85
Amount of tax if extended on 30% of return	355.00

1924

Return made by the company	19,380.00
Assessed by Board of Review as estimated "omitted net receipts"	15,000.00
Tax extended on Board of Review assessment	1,260.00
Amount of tax if extended on 30% of return	478.00

1925

Return made by the company	30,198.00
Assessed by Board of Review as estimated "omitted net receipts"	27,020.00
Tax extended on Board of Review assessment	2,444.32
Amount of tax if extended on 30% of return	814.00

1926

Return made by the company	61,280.00
Assessed by Board of Review as estimated "omitted net receipts"	45,000.00
Tax extended on Board of Review assessment	4,180.50
Amount of tax if extended on 30% of return	1,700.00

[fol. 23-48]

1927

Return made by the company	66,792.00
Assessed by Board of Review as estimated "omitted net receipts"	103,660.00
Tax extended on Board of Review assessment	5,027.53
Amount of tax if extended upon 60% of the amount of company return	1,920.00
Total taxes on Board of Review assessments	$13,980.20
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	5,267.00

Globe Insurance Company

1923	
Return made by the company	$30,404.89
Assessed by Board of Review as estimated "omitted net receipts"	34,500.00
Tax extended on Board of Review assessment	2,728.95
Amount of tax if extended on 30% of return	711.00
1924	
Return made by the company	32,151.00
Assessed by Board of Review as estimated "omitted net receipts"	30,160.00
Tax extended on Board of Review assessment	2,533.46
Amount of tax if extended on 30% of return	806.00
[fol. 23-49] **1925**	
Return made by the company	34,558.74
Assessed by Board of Review as estimated "omitted net receipts"	23,715.00
Tax extended on Board of Review assessment	2,146.24
Amount of tax if extended on 30% of return	923.00
1926	
Return made by the company	33,442.12
Assessed by Board of Review as estimated "omitted net receipts"	22,950.00
Tax extended on Board of Review assessment	2,132.08
Amount of tax if extended on 30% of return	929.00
1927	
Return made by the company	35,844.84
Assessed by Board of Review as estimated "omitted net receipts"	49,200.00
Tax extended on Board of Review assessment	2,386.20
Amount of tax if extended upon 60% of the amount of company return	1,041.00
Total taxes on Board of Review assessments	$11,926.93
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	4,410.00

[fol. 23-50] Mechanics' Insurance Company

1923	
Return made by the company	$11,680.00
Assessed by Board of Review as estimated "omitted net receipts"	17,750.00
Tax extended on Board of Review assessment	1,404.04
Amount of tax if extended on 30% of return	268.00
1924	
Return made by the company	34,229.00
Assessed by Board of Review as estimated "omitted net receipts"	21,340.00
Tax extended on Board of Review assessment	1,792.60
Amount of tax if extended on 30% of return	856.00
1925	
Return made by the company	53,420.00
Assessed by Board of Review as estimated "omitted net receipts"	43,605.00
Tax extended on Board of Review assessment	3,946.25
Amount of tax if extended on 30% of return	1,438.00
1926	
Return made by the company	105,131.00
Assessed by Board of Review as estimated "omitted net receipts"	82,275.00
Tax extended on Board of Review assessment	7,643.38
Amount of tax if extended on 30% of return	2,926.00

[fol. 23-51]

1927	
Return made by the company	114,965.00
Assessed by Board of Review as estimated "omitted net receipts"	159,040.00
Tax extended on Board of Review assessment	7,713.46
Amount of tax if extended upon 60% of the amount of company return	4,313.00
Total taxes on Board of Review assessments	22,499.73
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	9,801.00

Mechanics & Traders Insurance Company

1923

Return made by the company	$14,473.00
Assessed by Board of Review as estimated "omitted net receipts"	16,900.00
Tax extended on Board of Review assessment	1,336.79
Amount of tax if extended on 30% of return	332.00

1924

Return made by the company	40,988.00
Assessed by Board of Review as estimated "omitted net receipts"	23,570.00
Tax extended on Board of Review assessment	1,979.93
Amount of tax if extended on 30% of return	1,008.00

[fol. 23-32] 1925

Return made by the company	47,640.00
Assessed by Board of Review as estimated "omitted net receipts"	27,855.00
Tax extended on Board of Review assessment	2,520.90
Amount of tax if extended on 30% of return	1,030.00

1926

Return made by the company	72,043.00
Assessed by Board of Review as estimated "omitted net receipts"	41,705.00
Tax extended on Board of Review assessment	3,874.44
Amount of tax if extended on 30% of return	1,950.00

1927

Return made by the company	46,241.00
Assessed by Board of Review as estimated "omitted net receipts"	57,400.00
Tax extended on Board of Review assessment	2,783.90
Amount of tax if extended on 60% of the amount of company return	1,344.00
Total taxes on Board of Review assessments	12,495.96
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	5,937.00

[fol. 23-53] Milwaukee Mechanics' Insurance Company

1923

Return made by the company	$138,401.00
Assessed by Board of Review as estimated "omitted net receipts"	107,000.00
Tax extended on Board of Review assessment	8,463.70
Amount of tax if extended on 30% of return	3,274.00

1924

Return made by the company	143,149.00
Assessed by Board of Review as estimated "omitted net receipts"	110,750.00
Tax extended on Board of Review assessment	9,303.02
Amount of tax if extended on 30% of return	3,603.00

1925

Return made by the company	108,196.36
Assessed by Board of Review as estimated "omitted net receipts"	62,875.00
Tax extended on Board of Review assessment	5,690.21
Amount of tax if extended on 30% of return	2,932.00

1926

Return made by the company	142,574.42
Assessed by Board of Review as estimated "omitted net receipts"	103,925.00
Tax extended on Board of Review assessment	9,639.17
Amount of tax if extended on 30% of return	3,957.00

[fol. 23-54]

1927

Return made by the company	145,345.00
Assessed by Board of Review as estimated "omitted net receipts"	202,210.00
Tax extended on Board of Review assessment	9,811.73
Amount of tax if extended upon 60% of the amount of company return	4,219.50
Total taxes on Board of Review assessments	$42,907.83
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	$17,985.50

National Fire Insurance Company

1923

Return made by the company	$354,950.00
Assessed by Board of Review as estimated "omitted net receipts"	106,485.00
Tax extended on Board of Review assessment	8,423.00
Amount of tax if extended on 30% of return	8,305.00

1924

Return made by the company	340,759.00
Assessed by Board of Review as estimated "omitted net receipts"	191,093.00
Tax extended on Board of Review assessment	16,043.40
Amount of tax if extended on 30% of return	8,400.00

[fol. 23-55]

1925

Return made by the company	340,203.00
Assessed by Board of Review as estimated "omitted net receipts"	192,840.00
Tax extended on Board of Review assessment	17,453.48
Amount of tax if extended on 30% of return	9,231.00

1926

Return made by the company	378,489.00
Assessed by Board of Review as estimated "omitted net receipts"	248,165.00
Tax extended on Board of Review assessment	23,032.45
Amount of tax if extended on 30% of return	10,497.00

1927

Return made by the company	378,782.00
Assessed by Board of Review as estimated "omitted net receipts"	439,250.00
Tax extended on Board of Review assessment	21,264.41
Amount of tax if extended upon 60% of the amount of company return	10,999.00
Total taxes on Board of Review assessments	$86,216.54
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	$47,422.00

[fol. 23-56] National-Ben Franklin Fire Insurance Company

1923

Return made by the company	$80,328.00
Assessed by Board of Review as estimated "omitted net receipts"	65,300.00
Tax extended on Board of Review assessment	5,165.23
Amount of tax if extended on 30% of return	1,898.00

1924

Return made by the company	77,241.00
Assessed by Board of Review as estimated "omitted net receipts"	70,965.00
Tax extended on Board of Review assessment	5,961.08
Amount of tax if extended on 30% of return	1,945.00

1925

Return made by the company	70,537.00
Assessed by Board of Review as estimated "omitted net receipts"	152,925.00
Tax extended on Board of Review assessment	13,839.00
Amount of tax if extended on 30% of return	1,900.00

1926

Return made by the company	55,733.00
Assessed by Board of Review as estimated "omitted net receipts"	69,720.00
Tax extended on Board of Review assessment	6,477.01
Amount of tax if extended on 30% of return	1,493.00

[fol. 23-57] 1927

Return made by the company	60,493.00
Assessed by Board of Review as estimated "omitted net receipts"	143,030.00
Tax extended on Board of Review assessment	6,946.27
Amount of tax if extended upon 60% of the amount of company return	1,755.70
Total taxes on Board of Review assessments	$38,388.59
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	8,991.70

Reliable Fire Insurance Company of Dayton

1923

Return made by the company	$19,156.35
Assessed by Board of Review as estimated "omitted net receipts"	13,500.00
Tax extended on Board of Review assessment	1,067.85
Amount of tax if extended on 30% of return	454.57

1924

Return made by the company	22,205.93
Assessed by Board of Review as estimated "omitted net receipts"	15,240.00
Tax extended on Board of Review assessment	1,280.20
Amount of tax if extended on 30% of return	554.00

[fol. 23-58]

1925

Return made by the company	26,108.61
Assessed by Board of Review as estimated "omitted net receipts"	17,920.00
Tax extended on Board of Review assessment	1,621.77
Amount of tax if extended on 30% of return	705.00

1926

Return made by the company	25,246.29
Assessed by Board of Review as estimated "omitted net receipts"	17,325.00
Tax extended on Board of Review assessment	1,609.52
Amount of tax if extended on 30% of return	696.00

1927

Return made by the company	27,897.83
Assessed by Board of Review as estimated "omitted net receipts"	38,290.00
Tax extended on Board of Review assessment	1,857.09
Amount of tax if extended upon 60% of the amount of company return	808.00
Total taxes on Board of Review assessments	$7,436.43
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	3,217.57

[fol. 23-59] Security Fire Insurance Company, of Davenport, Iowa

1923

Return made by the company	$23,988.17
Assessed by Board of Review as estimated "omitted net receipts"	16,340.00
Tax extended on Board of Review assessment	1,292.52
Amount of tax if extended on 30% of return	569.00

1924

Return made by the company	28,047.89
Assessed by Board of Review as estimated "omitted net receipts"	19,250.00
Tax extended on Board of Review assessment	1,617.02
Amount of tax if extended on 30% of return	705.00

1925

Return made by the company	33,698.07
Assessed by Board of Review as estimated "omitted net receipts"	23,125.00
Tax extended on Board of Review assessment	2,092.84
Amount of tax if extended on 30% of return	900 00

1926

Return made by the company	36,587 37
Assessed by Board of Review as estimated "omitted net receipts"	25,110.00
Tax extended on Board of Review assessment	2,332.76
Amount of tax if extended on 30% of return	926.00

[fol. 23-60] 1927

Return made by the company	39,216.28
Assessed by Board of Review as estimated "omitted net receipts"	53,830.00
Tax extended on Board of Review assessment	2,610.78
Amount of tax if extended upon 60% of the amount of company return	1,140.00

Total taxes on Board of Review assessments	$9,945.92
Total taxes if extended on 30% of returns made by the companies for 1923, 1926 and 60% for 1927	4,240.00

Superior Fire Insurance Company

1923

Return made by the company	$46,950.00
Assessed by Board of Review as estimated "omitted net receipts"	45,425.00
Tax extended on Board of Review assessment	3,593.15
Amount of tax if extended on 30% of return	1,107.00

1924

Return made by the company	46,468.00
Assessed by Board of Review as estimated "omitted net receipts"	54,220.00
Tax extended on Board of Review assessment	4,554.51
Amount of tax if extended on 30% of return	1,167.00

[fol. 23-61]

1925

Return made by the company	62,215.00
Assessed by Board of Review as estimated "omitted net receipts"	46,664.00
Tax extended on Board of Review assessment	4,221.33
Amount of tax if extended on 30% of return	1,683.00

1926

Return made by the company	22,285.00
Assessed by Board of Review as estimated "omitted net receipts"	40,510.00
Tax extended on Board of Review assessment	3,763.42
Amount of tax if extended on 30% of return	613.00

1927

Return made by the company	17,248.00
Assessed by Board of Review as estimated "omitted net receipts"	63,280.00
Tax extended on Board of Review assessment	3,069.10
Amount of tax if extended upon 60% of the amount of company return	499.55

Total taxes on Board of Review assessments	19,201.51
Total taxes if extended on 30% of returns made by the companies from 1923-1926 and 60% for 1927	5,069.55

[fol. 23-62] Transcontinental Insurance Company

1926

Return made by the company	$22,459.00
Assessed by Board of Review as estimated "omitted net receipts"	19,260.00
Tax extended on Board of Review assessment	1,789.27
Amount of tax if extended on 30% of return	532.00

1927

Return made by the company	53,696.00
Assessed by Board of Review as estimated "omitted net receipts"	125,000.00
Tax extended on Board of Review assessment	6,062.00
Amount of tax if extended upon 60% of the amount of company return	1,559.00
Total taxes on Board of Review assessments	$7,851.27
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	2,091.00

[fol. 23-63] United American Insurance Company of Pennsylvania

1923

Return made by the company	$26,158.63
Assessed by Board of Review as estimated "omitted net receipts"	23,800.00
Tax extended on Board of Review assessment	1,882.58
Amount of tax if extended on 30% of return	616.00

1924

Return made by the company	17,434.11
Assessed by Board of Review as estimated "omitted net receipts"	20,060.00
Tax extended on Board of Review assessment	1,685.06
Amount of tax if extended on 30% of return	428.00

1925

Return made by the company	19,656.98
Assessed by Board of Review as estimated "omitted net receipts"	13,490.00
Tax extended on Board of Review assessment	1,220.88
Amount of tax if extended on 30% of return	515.00

[fol. 23-64]

1926

Return made by the company	19,347.66
Assessed by Board of Review as estimated "omitted net receipts"	13,280.00
Tax extended on Board of Review assessment	1,233.73
Amount of tax if extended on 30% of return	529.00

1927

Return made by the company	19,895.89
Assessed by Board of Review as estimated "omitted net receipts"	27,310.00
Tax extended on Board of Review assessment	1,324.56
Amount of tax if extended on 60% of the amount of company return	576.00
Total taxes on Board of Review assessments	$7,346.81
Total taxes if extended on 30% of returns made by the companies for 1923-1926 and 60% for 1927	2,664.00

[fol. 23-65] PROCEEDINGS BEFORE BOARD OF REVIEW DECEMBER 15, 16, AND 28, 1927

December 15, 1927, there were present the following:

Mr. Edward R. Litsinger, Chairman; Mr. Charles V. Barrett and Mr. William H. Weber, constituting the Board.

Hon. Samuel A. Ettelson, Corporation Counsel, by Mr. Hiram T. Gilbert, Special Counsel for the City of Chicago, and Mr. Herman B. Seeley, Mr. Leon Hornstein, appeared on behalf of the City of Chicago.

Messrs. Hicks & Folonie; by Mr. Ernest H. Hicks, and Mr. Frederick D. Silber, Mr. Martin J. Isaacs, Mr. Samuel

Levin, Mr. Luther F. Binkley, Mr. Phillip H. Treacy, appeared on behalf of certain insurance companies.

Thereupon the following occurred:

Mr. Barrett: These complaints originated in the office of the Corporation Counsel of the City of Chicago. In order that you may be fully aware of the Corporation Counsel's complaints, I think it might be well for the representatives of the Corporation Counsel's office to make a statement to elucidate matters, if there is anything to be done in that direction.

Mr. Gilbert: These complaints arise out of Section 30 of the Fire, Marine, Inland Navigation Insurance Company Act passed in 1869. The section requires *from* fire, marine and inland navigation insurance companies to file their report of net proceeds to be entered on the tax lists and [fol. 23-66] subjected to the same rate of taxation as other personal property. The controversy in reference to this matter is an old one. It arose about 1918. The companies, some of them, refused to report their taxes on their net proceeds, and application was made for mandamus in the Circuit Court to compel the agent to make return. The first case that went to the Supreme Court was what is called the Kent case.

Mr. Barrett: First of all, will you tell the court what you are trying to have the Board do, and when we come to the legal aspect, the issues, we can listen to that.

Mr. Gilbert: We are trying to have the Board list the net receipts of these insurance companies for the present year and past years, and base them as the law required to make an assessment.

Mr. Barrett: All right, tell us what your idea of the law is.

Mr. Gilbert: Well, the law is settled now by the Supreme Court of Illinois, as far as it has been settled, is that these receipts are on the same basis as other property. That is to say, they are not to be assessed upon the full amount, but on the debased value, which for the present year is the full value, and for past years it is one-third or one-half or one-fifth. That is what we are asking.

I do not know what more there is to say. These companies were assessed at one time on the same basis as other properties, and the Supreme Court held that that was wrong, that they should be assessed upon the full amount.

It was so assessed, and then the tax was contested and the Supreme Court adhered to its decision. It went to the [fol. 23-67] Supreme Court of the United States, and they held that that was wrong, that the tax extended upon the full amount of net proceeds was in violation of the Fourteenth Amendment. Our Supreme Court overruled that previous decision in the Kent case and in the Barrett case held the assessment was made to be made on the same basis as other property. Now, we are asking that the receipts of these companies for the past five years or four years; I think it is four or five years, on which they were assessed on the full basis, be reassessed upon the proper basis, and also that they be assessed upon the net receipts which they omitted to report in previous years.

Mr. Barrett: Well, you claim now they omitted to report this year the net proceeds.

Mr. Silber: I can answer that.

Mr. Seeley: I went through the books, and most of the companies made returns of the net proceeds, but not upon the form prescribed by statute.

Mr. Hicks: You mean Form 16?

Mr. Silber: We made a return by way of affidavit setting up our net proceeds.

Mr. Barrett: Well, you haven't proceeded last year——

Mr. Silber: We followed the same proceeding as last year.

Mr. Seeley: They made a return for the current year, but made no return for back years. We complain about those returns.

The Chairman: Your statement about the Supreme Court of Illinois, that the net premiums are to be assessed on the same basis as other property.

[fol. 23-68] Mr. Gilbert: Yes. For the present year they would be assessed on the full value.

The Chairman: That is what the distinction is, the assessed valuation against the full value.

Mr. Gilbert: That is the distinction.

Mr. Barrett: Well, as a matter of fact, prior to the Supreme Court's ruling upon it, it was your contention that these particular receipts under this statute, special statute, which is not a part of the Revenue Act, were to be assessed by this Board as a whole, and not to be divided by two as the assessed value. Now, you say the Supreme

Court has taken it up and decided that is not so, that it should be assessed on assessed value. Of course, at this particular time that makes no difference because the assessed value now is the whole value.

Mr. Gilbert: I want to say that I never agreed with that construction.

Mr. Barrett: You don't agree with the United States Supreme Court?

Mr. Gilbert: No, and I didn't agree with the State Supreme Court on that point.

The Chairman: I wonder if we could find out from the representatives of the insurance companies as to whether there is any question about that statement of Judge Gilbert?

Mr. Hicks: I differ entirely with Judge Gilbert. This law is not settled either in the State Supreme Court because the last decision has been pending almost a year, which they have not decided, so we have got no law on it at all.

[fol. 23-69] Mr. Barrett: Well, we don't care about that, we can settle the law very easily here.

Mr. Silber: Well, I agree with Mr. Hicks on what he has just said, but I have something more to say. Well, as to the question about agreement as to the law, that has been tested, that has been tried out by the tax authorities in the State of Illinois on Section 30, and up to date it has been decided against the tax authorities, and that today the law is settled here as far as it can be settled under Section 30; that is, you can't tax re-insurance companies doing a re-insurance business in Illinois; and can't tax foreign stock fire insurance on the basis of 100 per cent extended net proceeds.

Mr. Gilbert: I will say that as to the decision of the Supreme Court of Illinois, they decided this case at the June term, and decided it, according to my contention, that the tax was a legal tax if assessed upon the debased value. A petition for a rehearing has been filed and is still pending.

Mr. Silber: Under the decision of the United States Supreme Court in 71 Lawyers Edition, Hanover Fire Insurance Company vs. Carr, that court in reviewing Section 30, it held it is unconstitutional and void.

Mr. Sibler: Our notice requires us to file returns back to 1870, 57 years.

Mr. Barrett: I am talking about the future.

Mr. Silber: We agree on that.

Mr. Seeley: I think one point has been overlooked here. When the entry of assessment is made by the Board of Assessors for the full amount of net proceeds, it comes before the Board of Review then as to whether all of the [fol. 23-70] property assessments, as made, are absolutely full value, or whether there should be an equalization in this case.

Mr. Barrett: Equalization and my point don't conflict with each other at all. That will come up later. Let me ask you this, Judge Gilbert. I take it, it is contended by the other side that Section 30 has been declared unconstitutional by the United States Supreme Court. What do you say about that?

Mr. Gilbert: No, they didn't declare any such thing; they declared this tax as asesssed on the full value was in violation of the Fourteenth Amendment, but they took care to say also, that in past years when the Board of Review or Assessors debased this property as other property was debased in value, it might well have been said that there was no inequality between foreign and domestic companies. They said that in plain language.

Mr. Barrett: Then you insist that Section 30 is in full force?

Mr. Gilbert: Certainly.

Mr. Barrett: Has it been adjudicated by the Supreme Court of Illinois?

Mr. Silber: No.

Mr. Gilbert: It has been decided.

Mr. Seeley: The Supreme Court of the United States has not pronounced the statute to be invalid, but they had held that the assessment then under review of 100 per cent was invalid, and the county clerk would be authorized to divide it by two.

Mr. Barrett: Well, I think we should read the decision [fol. 23-71] of the United States Supreme Court, and also the Supreme Court of the State of Illinois. If it is the law that Section 30 has been declared unconstitutional, then we could do nothing else but disregard the matter entirely.

Mr. Silber: I would like to have you hear me on some other aspects of this matter.

Mr. Barrett: Well, I know, but let's have this one first.

Mr. Silber: I mean on this matter. I don't think the

Board of Review at this moment understands what we are here for, I don't think you know what we have been called upon to do.

Mr. Barrett: We are trying to establish some principles first, and if such eminent lawyers as you will agree as to the law, but evidently you don't. If there was an agreement as to the law, we could take the next step. Now, if there is no agreement as to the law, we will have to determine it.

Mr. Silber: There is an agreement as to the law, as to certan principles applying to the Board of Review, and those are the things I want to bring to your Honor's notice. That is all. I simply want to call attention of the Board of Review to some fundamental facts about the power of the Board to act in this matter at all. For six years the Board has continued, year by year, to perpetuate the same errors against various stock fire insurance companies in violation of the plain principles of the statute, and those errors have grown to such an extent that there was ten or twelve million dollars of so-called taxes on the tax books of the county, [fol. 23-72] and not a dollar of those taxes has been paid or will be paid on account of those errors.

Now, the insurance companies up to 1922 were very glad indeed to shoulder their burden of the public expense, and they did so by paying their share. In 1922, when People against Kent was decided an agent of a foreign insurance was mandamused to make a return under Section 30, and the Supreme Court of Illinois in that case held inferentially that the net proceeds should be extended on a basis of 100 per cent. In People vs. Barrett this Board was mandamused to spread an assessment on the basis of 100 per cent, and in the subsequent case of Hanover vs. Carr, the Supreme Court said that was correct, and then the United States Supreme Court said it was wrong and reversed that principle, and said, not that you could assess taxes upon the basis of 50 per cent, or like other personal property, but said that because in the past it had been paid on that basis, there might be a condition for saying that from those conditions, here was nothing discriminatory, arbitrary and unlawful, but that is all the court said in the case of Hanover vs. Carr. When the case came back to the Supreme Court of Illinois, the taxing authorities insisted that they

were wrong in claiming an extension of 100 per cent net proceeds, and the Supreme Court handed down an opinion in which they said that would support the constitutionality of Section 30 if the company's net proceeds could be assessed on the same basis as other property, and that opinion is pending on a rehearing, is number 1 on the rehearing docket at the June term and has never been decided. That is the complaint of five or six other cases in the Supreme [fol. 23-73] Court, in which the insurance companies have been successful in every case, and the tax authorities have been unsuccessful. Those cases hold that you can't assess net proceeds. The Skandia case holds that you can't make a foreign insurance company pay on certain additional net proceeds; the Columbia Insurance Company case, that was a bill to make foreign insurance companies account, and there are 200 of those bills pending in the Superior and Circuit Courts of this county. They can't compel foreign insurance companies to account for thirty years' back taxes as they are trying to make us do this morning, by asking us to file returns back to 1870.

Now, I said I didn't think the members of this Board understood what we are here for. The insurance companies are not outlaws, they represent substantial interests in this community, and they have been ready, able and willing and are now ready, able and willing to pay taxes.

Now, I want to say, that under the Revenue Act you haven't any power in this case except to list the net proceeds according to the return we file. Under the act, under the statute, Section 30——

The Chairman: You mean to say that all we could do is to automatically list or take your figures as you list them?

Mr. Silber: Extend them.

The Chairman: Suppose those figures are wrong or fraudulent?

Mr. Silber: The Supreme Court has said you can mandamus us to make a correct return.

The Chairman: What is the use in our sitting here?

[fol. 23-74] Mr. Silber: Absolutely nothing——

The Chairman: If you file any kind of fake return that would be fraudulent, we couldn't make any corrections?

Mr. Gilbert: Let me ask, are you sure of your statement of the opinion in People vs. Barrett?

Mr. Silber: I am sure.

Mr. Gilbert: Why grant a mandamus against the Board of Review then?

Mr. Silber: Because they had before them the returns made by the company in each case.

Mr. Barrett: I only interrupt to get your point.

Mr. Silber: I want to answer all questions that occur to you.

The point we make is this, that since you are not exercising power under the Revenue Act, and since all you can do is to follow the opinion of the Supreme Court, and Section 30 of the act, Section 30 of the act says every agent, every insurance company having an agent here, must file a net return, net proceeds, which proceeds shall be listed and assessed at the same rate as other personal property. It doesn't say a word about assessors, it doesn't say a word about the Board of Review.

Now, your power is purely statutory, and nothing else, and you can't do a thing that the statute does not give you power to do. You have no power under the Revenue Act over net proceeds; you have power under Section 30 and Section 30 doesn't say a word about giving you power to change the returns.

[fol. 23-75] Mr. Barrett: Suppose an error was made, and the insurance company came in and represented that an error was made?

Mr. Silber: They can correct it.

Mr. Barrett: Has the Supreme Court sustained you?

Mr. Silber: Absolutely.

Mr. Barrett: Then, read to us from that decision. If what you say is right, then there is no use of doing anything further.

Mr. Silber: In People vs. Kent and People vs. Barrett, 309 Ill. 64, the Supreme Court said this.

Mr. Silber: 309 Ill., page 64.

"However, this tax is not assessed under the Revenue Act but under Section 30 of the Fire, Marine and Inland Navigation Act. Paragraph 4 of Section 2 of the act of 1919—

"It is contended by the answer of the respondents that they have no authority to compel by mandamus the making of returns by the agents of foreign companies. That question has been settled otherwise in People vs. Kent, supra,

where it was held that such agents may be compelled by writ of mandamus to make the return required by Section 30."

Now, that is the limit of your power under Section 30.

Mr. Barrett: I don't agree with you, that your statement is as outlined in that opinion; you have gone further; that doesn't say we haven't any power.

Mr. Silber: Where do you get it then?

Mr. Barrett: Well, you can show us where we haven't [fol. 23-76] any right; we are going to exercise it until the court stops us.

Mr. Silber: All right, I can answer you. You are admitting, Mr. Barrett, that the only right the assessor has is the right created by statute. Now, then, unless you can point in the statute to the right, the right you are exercising, you are usurping a right.

Mr. Barrett: We have a right to at least consider that the act meant something, and for an act to be passed merely to give you the right to do what you want to, doesn't seem logical to me.

Mr. Silber: That act has been in force since 1857.

Mr. Barrett: Well, it has never been much benefit to the people of Cook County.

Mr. Silber: It has been very profitable, we have paid two million dollars in taxes under that act.

Mr. Barrett: That is a lot of money, but sometimes it may not be in proportion to what you ought to pay.

Mr. Silber: We are ready to pay what we should pay, if you can show us what we ought to pay.

Mr. Barrett: The courts are final, but we are not going to take your reading of that opinion.

Mr. Silber: I don't ask you to.

The Chairman: That word was omitted there to save repetition. Then, it does say "assess," and we don't simply automatically confirm your figures.

Mr. Silber: No, you don't, the Supreme Court has said in another case that you don't.

Mr. Barrett: You don't agree with the language read in your argument then?

[fol. 23-77] Mr. Silber: Well, I am calling attention to the fact that in another case the Supreme Court has said you don't "assess."

The Chairman: Read that clause again.

Mr. Silber: "However, this tax is not assessed under the Revenue Act but under Section 30 of the Fire, Marine and Inland Navigation Act."

The Chairman: Then, according to that language, it is not assessed under the Revenue Act, but it is assessed under Section 30.

Mr. Silber: Yes, if you are simply searching for the word——

The Chairman: Why not assess? We don't simply confirm some figures that were made by you.

Mr. Silber: Let me read to you from 317 Ill. 372:

"It will be noted that under Section 30 the company's net proceeds are not to be valued——"

In other words, the Supreme Court has said you can't value anything here, because we are bound to make a return, and if our return is wrong, you can compel us to correct it.

Mr. Barrett: Who do you make the return to?

Mr. Silber: Make the return to the assessors, that is what the statutes say.

Mr. Barrett: It doesn't say that the Revenue Act gives us power to review.

Mr Silber: Not under Section 30.

Mr. Barrett: Doesn't it give that general power?

Mr. Silber: No, not as to Section 30.

Mr. Barrett: Doesn't it give us any general power?

Mr. Silber: Sure.

[fol. 23-78] Mr. Gilbert: Doesn't the statute give the Board of Review power to assess omitted receipts?

Mr. Silber: Yes, I am coming to that, it does, the original act prior to 1898 when the Revenue Act was passed, gave the assessor power to assess omitted property, but the Supreme Court passed upon omitted property in the Warner case in the 238 Ill., and the Taylor case in the 211 Ill., and said that after that neither the assessor nor the Board of Review can consider property that has ever been listed at all, as omitted property.

Now, in the cases here we list these net proceeds by making affidavit, and under the authority of the last three cases of the Supreme Court the Board of Review has no

power to assess omitted property, because each year that class of property was before you and was assessed.

Now, I am not trying to get any benefits for these insurance companies, but I want to tell you that for six years the insurance companies have been defending against two hundred bills for accounting which went back thirty years. They are here asked this morning to account for 57 years. They have pending in the Circuit and Superior Courts over one hundred suits for accounting for thirty years. They have sued us in the Municipal Court on these taxes and we have had to try them, and judgments for the defendants in every case. We have been cited here, not because we don't want to pay taxes, but for the Board of Review in this case to exercise a power it had no right to exercise. For instance, each year our returns under oath have been disregarded. You have assessed a fifty per cent penalty, and haven't had a shadow of power to assess it.

[fol. 23-79] Mr. Barrett: Has the Supreme Court said that?

Mr. Silber: No, you have said it.

Mr. Barrett: Has the Supreme Court confirmed what you have just said?

Mr. Silber: The court has said this tax is not under the Revenue Act.

Mr. Barrett: You are talking now of the Supreme Court. If the Supreme Court tells us we haven't any right to do it, we are not going to do it.

Mr. Silber: No, but what power have you to do it?

Mr. Barrett: You tell us where we haven't the power.

Mr. Silber: I am telling you where you haven't the power; you have assessed a fifty per cent penalty——

Mr. Barrett: We have the right to review whatever the assessors under general powers give us. It is my opinion that we are going as far as whatever powers are given us.

Mr. Silber: I am not going to quarrel with you as to what you think your powers are; I am going to respectfully tell you what I think they are, and you don't have to listen to me if you don't care to. I am simply trying to tell you what I think the powers of the Board are. Now you have assessed a 50 per cent penalty against us here, and there isn't any warrant in the Insurance Act for assessing any penalty against us. We have protested here, we have here sworn returns every year. Why should that 50 per cent

penalty be assessed? In 1924 there were two kinds of assessments, one on a 100 per cent basis, and one on a 50 per [fol. 23-80] cent basis; both taxes stand as taxed against us which, if they were upheld as to constitutionality, we might have to pay, and there isn't any fairness in that, and there isn't any law in that. Now, today we come here with a demand that we file returns for 57 years back, a demand that is humanly impossible.

Mr. Barrett: That is almost the same as 57 varieties.

Mr. Silber: Yes, I agree with you. But just imagine what that means, if we were to try it, under this Section 30, where it is impossible to make returns. Why, the companies would have to come to the City of Chicago and find out who the agent was for 57 years, all the consolidations and changes of agents for 57 years, and follow them down.

Mr. Barrett: Fifty-seven years ago I wasn't thinking about that.

Mr. Silber: Neither was I. Now, that is the situation and in our judgment the Board of Review ought to pay no attention to a notice such as this, in order to get results. If we want results, and we are willing to pay taxes on a legal basis, but if we want results, then, we should be protected from tax harassing and get down to a basis where we can get results.

Mr. Barrett: Who do you represent, all of them?

Mr. Silber: I represent about two hundred of them.

Mr. Barrett: Will you take just one company, and tell us about that particular instance?

Mr. Silber: The Hanover, prior to April 1st, prepared an affidavit from its books and records of net receipts that [fol. 23-81] it had received in Cook County, and filed that affidavit with the Board of Assessors within the time required by law. That affidavit was a correct statement of the net proceeds. The Board of Assessors disregarded it and passed the matter on to the Board of Review. That affidavit is the return, and that return is here for consideration by the Board. Now, the agent of these other companies did exactly the same thing, each of them filed a sworn return in the form of affidavit.

Mr. Barrett: Now, Mr. Hornstein, here is the record filed by the Board of Assessors, by L. E. Angerman, agents, Insurance Exchange building, Chicago, Illinois.

Mr. Hornstein: Our objection to this is that it is not made out in the form required by the Supreme Court. Our objection to the particular return is that it is not made out on Form 16, which the Supreme Court said should be used for that purpose.

Mr. Hicks: The Supreme Court hasn't said any such thing. It has been pending for four years and has never been decided. You are trying to mislead this Board.

Mr. Hornstein: The Supreme Court has upheld the returns on form 16, said that the returns shall be made out on Form 16. Now, there is nothing on this here which indicates how this was arrived at.

Mr. Barrett: Where is the decision which says that it must be made on Form 16?

Mr. Hicks: That is referred to in the Barrett case?

Mr. Silber: Well, if the court please, the Barrett case [fol. 23-82] did say that Form 16 was a proper exercise of power, but in a subsequent case, the Supreme Court has had it under advisement since October, 1925, and not yet decided it.

Mr. Barrett: What is the one decision that now stands?

Mr. Silber: The one decision that now stands with refernce to Form 16 is the Barrett case, in which they said that Form 16 was proper to use.

Mr. Barrett: Then, until such time as the Supreme Court overrules that, we have the right to go on.

Mr. Silber: No.

Mr. Barrett: What is the matter with it?

Mr. Silber: We don't recognize that the Board of Review has any power to compel Form 16, or any other form.

Mr. Barrett: Then you are disagreeing with the Supreme Court.

Mr. Silber: Not at all.

Mr. Barrett: You are trying to convince the Supreme Court it was wrong.

Mr. Silber: No, we don't disagree on what the Supreme Court said in that case, but we don't propose to use Form 16 because we don't have to, and nobody can compel us to. You haven't at the present time any power. We are willing to make a sworn statement. Now, if you can find anything in the statute to make us follow Form 16——

Mr. Barrett: But the Supreme Court has said the Board of Review has the power to do it.

Mr. Silber: No.

[fol. 23-83] Mr. Barrett: What did it say?

Mr. Silber: The Supreme Court said, as a general proposition, that the State Tax Commission had the right to enforce Form 16, that in their opinion it was within the province of the State Tax Commission to make that form general, that is what they said.

Mr. Hornstein: They said it should be prescribed.

Mr. Silber: No, nothing else——

Mr. Hornstein: Now, as the matter stands, they make a return there which we can't check, can't do anything except take their final figure. Now, their final figure may be correct, for all we know at this time, but their return should be made on some proper form so that we can determine whether this is correct or not.

Mr. Silber: You can get a correct certificate by mandamus.

Mr. Barrett: I suppose the only way we could ever get it would be by mandamus.

Mr. Silber: That is the only way we will ever give it to you.

Mr. Barrett: Go on, Mr. Hornstein, from that point on.

Mr. Hornstein: That is all I have to say in regard to that. We don't know whether that is correct or not. I say they should make their returns on Form 16 so that we will know whether it is wrong, so that we can determine according to the decisions of the court in these various cases whether or not they have made the return.

[fol. 23-84] Mr. Barrett: Let me ask you this question, has the Supreme Court ever said we haven't the right to act?

Mr. Hicks: The matter has been pending for four years, and for some unknown reason they don't decide it.

Mr. Barrett: It is still undecided.

Mr. Hicks: It is still pending, yes, sir.

Mr. Barrett: When do you expect the Supreme Court will decide the matter?

Mr. Hicks: Well, I can't tell you.

Mr. Barrett: Is it now in issue in any one of the cases?

Mr. Gilbert: It is in the Fayart case; that was a petition in the Supreme Court, that was a petition for mandamus in the Supreme Court in order to determine the items which were under the accounting, and determine

what net proceeds were. That went to the Supreme Court in 1924, and it has been there now three years, and we hope it will be decided, but until it is decided, the decision in the Barrett case stands binding.

Mr. Barrett: Hasn't that question been in issue in one of these previous cases, directly in issue?

Mr. Hornstein: No.

Mr. Barrett: This is the only case in which it has been directly in issue. Has it been argued in the Supreme Court?

Mr. Silber: Argued and submitted.

Mr. Barrett: You mean to say this last issue we are talking about hasn't been decided in three years.

[fol. 23-85] Mr. Hicks: That is right, there is no legal decision.

Mr. Hornstein: It has been held up there. There were a number of items to be determined.

Mr. Silber: When the matter came up we appeared and stated that situation to the Board, and the Board agreed to accept pendente lite this form.

Mr. Barrett: Suppose you are wrong in your contention, have we any right to agree with you on your proposition? Suppose we now say you are wrong, and the Supreme Court then says we are wrong, what harm comes to you?

Mr. Siber: You mean in requiring Form 16?

Mr. Barrett: No, suppose we say to you now, we are not going to take this, we are going according to our own judgment in the matter, and the Supreme Court says we are wrong, you still have your relief. You say you are refusing to do that now which the Board of Review asks you to do, that is, use Form 16.

Mr. Silber: Pardon me for interrupting, but that is not the situation. You agreed with us several years ago.

Mr. Barrett: When did we agree?

Mr. Silber: Mr. Griggs, was it two or three years ago?

Mr. Hicks: We have been here from year to year.

Mr. Barrett: When did we agree?

Mr. Silber: My recollection is it was two or three years ago.

Mr. Barrett: Did we agree on that?

[fol. 23-86] Mr. Silber: To use this affidavit.

Mr. Barrett: Well, you have always had a court reporter here, haven't you?

Mr. Hicks: This is the first time.

Mr. Silber: Form 16 isn't the important thing; the important thing from our point of view is getting a correct tax.

Mr. Barrett: Well, apparently, the taxing body believes that the real important question here is Form 16.

Mr. Hicks: Just what do you mean?

Mr. Barrett: I am talking about the City of Chicago.

Mr. Hicks: And the School Board?

Mr. Barrett: And the School Board.

Mr. Gilbert: Form 16 enables us to determine——

Mr. Barrett: I know what you mean.

Mr. Gilbert: This form doesn't tell us anything.

Mr. Hicks: Now, if I may, I want just a minute, I am not going to quote any law, because I assume you have your own legal advisers and will follow them. Some of you are good lawyers yourselves, so I am not going to quote any law on this. I may quote from some other things.

Now, listen to me, I have got here a number of affidavits filed by the companies where there is double assessments, or the name is wrong, or the amount is different, and I want to file them officially. I assume you don't want them here, but that I should take them to the clerk.

Mr. Barrett: You can file them right here with the chairman.

[fol. 23-87] Mr. Hicks: All right, let them be marked filed, affidavits of protest, objections as to certain rates,—as to certain returns of certain companies for 1927. Then, there are one or two others that I would like to present to you.

Mr. Barrett: Give them to the chairman.

Mr. Hicks: Mr. Chairman, here is a return for the National Board of Fire Underwriters, these affidavits here. Now, they apply to the Oil Association, some of these companies combined under that name, but they do not receive premiums or do they pay taxes.

Mr. Barrett: Now, if there is any of these matters that you agree with him, let's eliminate them.

The Chairman: Why not have them write us a letter, giving us all they claim do not come within the statute here? We will protect you on your rights, or if we differ with you, we will give you a chance.

Mr. Hicks: That will be all right.

Mr. Seeley: No assessments were intended against the Oil Company.

The Chairman: Is there any objection to having this in writing?

Mr. Seeley: Now, there are other matters to be wound up in addition to fire and marine. There were no arbitrary assessments made against insurance companies on net receipts, but the assessments, the insurance companies' representatives and representatives of the City have agreed that there shall be no assessments against them until they have carried the matter to the Supreme Court and have obtained a decision on their liability. What we claim on the part of the taxing body is——

[fol. 23-88] The Chairman: Now, you are taking up a matter that we are perfectly willing to receive when we get to that.

Mr. Hicks: We will reduce that to writing, and put it in.

Mr. Seeley: Now, there is one thing the Board ought to know in order to get this matter clear, and that is that a general order be entered that all assessments for net proceeds be taken out of the regular assessment book and placed in a book by itself.

Mr. Barrett: I think that has been done. I think we have a separate warrant book.

Mr. Seeley: Put them all in a record book.

Mr. Barrett: Well, I know nothing about the assessment, but I know about the order we had last year.

Mr. Seeley: Well, if that order stands, then that takes care of itself.

Mr. Barrett: I presume the Board of Review will follow the best course.

Mr. Hicks: I would like to be heard at the proper time.

Mr. Barrett: Sure, are you through, Mr. Hicks.

Mr. Hicks: No, I haven't started. I want to file these papers.

Mr. Barrett: Now, wait a minute until Mr. Hicks gets through.

Mr. Hicks: I want to file these papers.

Mr. Barrett: Go ahead.

Mr. Hicks: Now, you will remember this thing has been pending a long time. Then another proposition, when we

[fol. 23-89] came up for assessment on 100 per cent premium rate, which these lawyers, Mr. Seeley, conceded was the only legal and proper——

Mr. Barrett: Well that is all past.

Mr. Hicks: Yes, but I am giving you a little history. When that came up we all met here year after year, and you said we were wrong and they were right. We filed objections to those things in writing. Now, so as not to plead them all over again, I now reaffirm and refile the objections which we filed to the assessments, to the action of the Board in levying 100 per cent premium rate.

The Chairman: You mean past or future?

Mr. Hicks: Past and future both.

Mr. Barrett: All our assessments are based on full value.

Mr. Hicks: Yes, I know.

Mr. Barrett: First of all, you still object to future assessments on 100 per cent?

Mr. Hicks: May I get this thought in your minds? It seems to be——

The Chairman: That the legal objections stand as objections to this assessment today.

Mr. Hicks: The notice says that we must file returns with you from each agent from 1870 down to the present time. That is what we are here to argue, to that notice. I wish to file the same objections, and reaffirm them, that we filed for the companies, on behalf of the Great American Insurance Company and all foreign fire insurance companies.

Mr. Gilbert: There ought to be no objection to that.

[fol. 23-90] The Chairman: That can be specified. It is simply a matter of clerical work.

Mr. Hicks: We were a little surprised, if I may say that, to receive that long notice to each company, signed by this Board, wherein and whereby you demanded on the 14th day of November, that on the 27th day of November each and every of the 250 fire insurance companies file a sworn return before this Board. In view of what has gone before, and in view of the decision of the United States Supreme Court in the case of Hanover vs. Carr, we were somewhat surprised, and without wishing to be impertinent in any way, and with all due respect to this Board, based on past history, for the last several years that these companies have gone through, this turns now very strongly to me in the

nature of an attempt to persecute these fire insurance companies in levying illegal taxes against them. I say this defendantially, based upon their history, and the reason of it stands there. The trouble for all of this work stands right there before you, that tax shark, and I can prove it.

Mr. Hornstein: Well, I object to that. I am here representing the City.

Mr. Hicks: Yes, he is an employe of the City. What is the matter is that in the last fifteen years, he has made a search through the County School Board, appointed to take charge of the matter of recovering unpaid taxes——

The Chairman: Mr. Hicks, will you permit just a word? In the first place, whatever you say about the Board, so far as I am concerned, will be disregarded. What you say about Mr. Seeley here or anybody else, I don't see how [fol. 23-91] it could have any bearing on the question of assessments, on the question of law. Let me just give you this. It is apparent that the legal question was raised, that an eminent judicial body, like the Supreme Court of the State of Illinois, decided that legal question one way. We assume that they decided that question according to their understanding of the law. The Supreme Court of the United States decided that question, the highest authority in this country, differently. Apparently, you are not going to impugn the motives of the Supreme Court of the State of Illinois in deciding questions of law as it did decide them, because the Supreme Court of the United States reversed it.

Now, not only that, but there is this here, competent lawyers and well experienced lawyers. Whatever counsel says, so far as I am concerned, will be disregarded, but as to Mr. Seeley or anybody else, it is beside the question. The County or State or municipal bodies are entitled to revenue according to law. Now, that is all I am interested in.

Mr. Hicks: That would be true.

The Chairman: What you think of Mr. Seeley or somebody else, or whatever it is, may be reprehensible out on the corner, and you can call him anything, you can call him a pickpocket, but in here that is beside the question.

Mr. Barrett: Mr. Hornstein, now, going back to this one particular case, the Hanover Insurance Company, they have filed an affidavit——

Mr. Hicks: By their agent.

Mr. Barrett: Now, what do you ask the Board to do? For [fol. 23-92] instance, take this particular one, let's answer that question.

Mr. Hornstein: We are asking you to revise that. We assume that they have followed the condition that they set up in the Barrett case, and have withheld from their gross receipts certain lines of insurance which we contend, in the Barrett case, were ordered to be returned.

Mr. Hicks: Where did you assume that?

Mr. Barrett: Will you please let me ask these questions?

Mr. Hicks: Yes.

Mr. Barrett: And when he gets through, you can talk. What do you mean by assume, have you anything to base it on?

Mr. Hornstein: Yes, we have.

Mr. Barrett: What have you to base it on?

Mr. Hornstein: We have this to base it on, they make a return annually to the State in which they show that they have received various amounts in the State, on various classes of insurance, and none of those classes of insurance are given; that they had been instructed, and are subject to tax, had been instructed by the Supreme Court in the Barrett case that all business of the company should be taxed.

Now, if they had shown there the amounts that they had received on these various classes of insurance, then it would be a perfectly fair assessment and could have been made; in other words, if you put in the amounts that are claimed as deductions for a subsequent class——

[fol. 23-93] Mr. Barrett: In other words, you are claiming this is a deficient return?

Mr. Hornstein: Deficient return, yes.

Mr. Barrett: Now, tell us in detail why it is deficient, what we should do, and why we should do it in this particular matter. Now, let's get down to one case. I am very anxious to know how we are going to correct this at this particular time.

Mr. Hornstein: Well, the Hanover Insurance Company has made a return to the City of Chicago.

Mr. Barrett: When can you show, when can you be ready to show what you wish us to do in this particular case? We can take any one you wish.

Mr. Hornstein: Today is Thursday.

Mr. Barrett: Yes.

Mr. Hornstein: When do you want to meet?

Mr. Barrett: When can you come, so that we can meet?

Mr. Hornstein: I can come in Saturday morning, or Friday afternoon, with a complete analysis of the Hanover statement. I would say this, that I have two of them worked out, not the Hanover Company, now, I can bring those in.

Mr. Barrett: I want the one case that these gentlemen are familiar with.

Mr. Hornstein: Yes. It doesn't mean necessarily the Hanover.

Mr. Barrett: Well, I don't care, the Hanover or someone else.

Mr. Hornstein: All right, we will bring in one.

Mr. Hicks: Are you going to take the Royal?

[fol. 23-94] Mr. Hornstein: No, I will take the Ætna.

Mr. Barrett: Will you be ready on that proposition then?

Mr. Hicks: Now, when, what time and place?

Mr. Barrett: I would like to have this one matter settled.

The Chairman: Well, let's make it Tuesday after Christmas.

Mr. Barrett: Why not tomorrow afternoon at two o'clock?

Mr. Hornstein: All right, tomorrow afternoon at two o'clock I will be here with a complete analysis.

Mr. Barrett: Let's argue one of these out.

Mr. Hicks: Now there is this one other thing; heretofore when there has been the 2 per cent penalty and the 100 per cent question up, which is now decided, the matter was continued over from time to time every year, by you, by us and by the other side, pending final law and decision. Now these decisions have not been finally filed on any question yet; the 100 per cent return is settled but the 50 per cent return is not settled, it is in the Supreme Court now on a motion to vacate. When those questions were up, and I say this with all sincerity for my clients, the Insurance Company, and I wish to reaffirm what Mr. Silber said, they are neither outlaws nor are they tax-dodgers, they want and desire to pay their legal taxes according to law, and in confirmation of that I call your attention, Mr.

Chairman, to the fact that each year while this thing was pending, I stood right here with Mr. Silber and we, with Senator Deneen, offered to your Board the 50 per cent [fol. 23-95] tax which we thought should be imposed, 50 per cent on our returns, and we tendered it to you year after year, but under your advice, whoever you got it from, you refused it.

The result has been that since Seeley accepted his thirty per cent contingent contract, and got them to follow him, the Insurance Companies who wished to pay taxes have been debarred from paying one cent revenue, and you have not received one cent.

The result is that the tax records for the last five years are in such shape, with two columns of assessments, one on full premium of 100 per cent and that divided by two and placed upon a 50 per cent basis, personal property tax, and I sincerely question whether, because of that you can collect any of these five years.

The Chairman: Wouldn't it have been easy for you to tender into the county treasury the 50 per cent?

Mr. Hicks: We tendered it to you.

The Chairman: Wouldn't it be easy to make out this Form 16 and go in and tender the 50 per cent, if you are anxious to pay 50 per cent instead of 100 per cent?

Mr. Hicks: Let me follow that "anxious to pay" with something?

The Chairman: Yes.

Mr. Hicks: We are willing to pay and anxious to pay provided we are paying our legal tax, but by the living Gods if you are going to follow the advice of this "Tax-Shark" through the mill we will take you right on through to the United States Supreme Court, until you see how [fol. 23-96] you like it. Now you can take that and see if you like it.

The Chairman: Who is asking you to pay anything not right?

Mr. Hicks: You are. You are serving us in today for taxes to be returned since 1870.

The Chairman: You mean to say that we have no right to bring this up here at all?

Mr. Hicks: I am not saying that at all. No question about that at all.

The Chairman: If your clients are instructed by you all right—I would stop at one, because so far as I am concerned you might as well talk to the wall.

Mr. Hicks: I assume that.

The Chairman: It is not an argument at all, it is not an intelligent talk at all.

Mr. Hicks: Yes.

The Chairman: If you have a jury here, you might be able to sway them and get some sympathy; but we are here and we are going to decide this according to what we think is the law, regardless of whether Mr. Seeley is a tax shark, or whether you paid fifty per cent or tendered fifty per cent, and we have not had any revenue, is something that is beside the question. Let us get down to business.

Mr. Hicks: Let me give you this conclusion?

The Chairman: You have concluded twice.

Mr. Hicks: No, I have not concluded at all. My conclusion is this, my suggestion to you is instead of placing on the tax books and levying against foreign fire insurance companies imaginary omitted taxes since 1870 down [fol. 23-97] to the present time, and which you ask "why should we not do it," and I admit you are going to do it, you did before, why not wait until the law is settled. As soon as it once passes through you and goes upon your books then there is trouble, there is no money.

Mr. Barrett: But if we did not do some of these things that we have done here you would not be in court at all.

Mr. Hicks: That would be unfortunate.

Mr. Barrett: And then you would not be in the case.

Mr. Hicks: Let me give you the law?

The Chairman: Are you going to argue the case now?

Mr. Hicks: You say I am not talking law?

The Chairman: You are talking now, but a minute ago you were talking to the gallery.

Mr. Hicks: That is a fault of mine.

The Chairman: I do not care for any gallery speech, we were to hear some law to see if we could agree. Are we going to hear you on the law tomorrow afternoon?

Mr. Hicks: I do not think so.

The Chairman: The point that interests me is your argument whether we did or did not do something that may be a violation of the rights of your client. We assume the responsibility for what we have done.

Mr. Hicks: What I was mildly protesting against was that you are starting it all over again.

[fol. 23-98] Let me ask you one thing, there was the Kent case, you got some law there; a mandamus came down for your Board to tax the companies on one hundred per cent return, didn't it? So far as I know, so far as you know that has never been revoked or cancelled, and it stands now.

So, if you are following the law, following the law of the State Supreme Court, why don't you follow that writ, that is open and undecided?

Another thing, let me ask you something—you do not have to answer—is it true that these notices were sent out with the idea in the Board's mind that you would undertake to tax us for omitted taxes from 1870 down to the present time, 57 years.

Mr. Barrett: Get all your facts on that one case, the Ætna case, ready for tomorrow afternoon at two o'clock and let us hear them.

Mr. Silber: All right.

Mr. Seeley: Yes.

Whereupon the further hearing of the above entitled matter was continued to Friday, December 16th, A. D. 1927, at 2 o'clock p. m.

[fol. 23-99] Friday, December 16, 1927, 2 o'clock p. m.

Hearing resumed pursuant to adjournment.

Parties present: Same as before.

Mr. Barrett: This has to do with the matter of net receipts, hasn't it?

Mr. Gilbert: Yes.

Mr. Barrett: Were you going to talk about that this afternoon or argue the personal property matter? What is your understanding on that?

Mr. Gilbert: My idea was to take up the Aetna Insurance Company.

Mr. Barrett: That was on the question of personal property, wasn't it?

Mr. Silber: No, net receipts.

Mr. Gilbert: Net receipts.

Mr. Silber: Under Section 30.

Mr. Hornstein: My understanding in regard to personal property was that you would take into consideration the schedules we filed as to each individual company, we passed them over to you yesterday morning, and that you would let us know in case there was anything you wanted.

Mr. Barrett: Didn't we pick out one particular one that we were going to talk about and examine?

Mr. Silber: You said you would pick out one concrete case, and see how that one concrete case was affected by these questions.

Mr. Barrett: The proposition was, as to whether there was a difference between the schedules which you filed and Form 16.

[Vol. 23-100] Mr. Silber: Form 16, that is what we had in mind.

Mr. Barrett: How are you going to proceed? This is what the board would like to know, as I understand, see if I am right: What the Board has been endeavoring to do and what the taxing bodies have been endeavoring to do, through the agency of the Board of Review, is to force insurance companies coming under this category to file on Form 16, as prescribed by the State Tax Commission. Is that true? Is that a correct statement?

Mr. Silber: That is true, that is one of the questions.

Mr. Barrett: That is a correct statement as far as I go?

Mr. Silber: Almost.

Mr. Barrett: Is it or isn't it?

Mr. Hicks: Except this, it was agreed that case being in litigation you would accept ours.

Mr. Barrett: Excluding that particular proviso of yours, my statement is correct, is it?

Mr. Silber: Yes.

Mr. Hicks: Absolutely.

Mr. Barrett: Now, instead of that, you filed an affidavit which you yourselves have prescribed, is that right?

Mr. Silber: Prepared.

Mr. Barrett: Prescribed, written, prepared, whatever you want to call it, in other words, the affidavit used by all of these companies in this category have not been prepared by the State Tax Commission, not authorized by the-, not [fol. 23-101] OK'd by them, nor have they been OK'd by this Board or the Board of Assessors.

Mr. Silber: That is correct.

Mr. Barrett: They have been written by either the companies or their agents or attorneys. That is true, isn't it?

Mr. Silber: Yes, that is true.

Mr. Barrett: Now then, what this board would like to know is what difference there is between these two, so far as the effect on the valuation for taxation is concerned.

Mr. Gilbert: Well, that is the question we are ready to present.

Mr. Barrett: Is that right, Mr. Litsinger?

The Chairman: Yes, whether it is a difference in substance or in form.

Mr. Barrett: That is it. Before I go further you contend it does not make any difference as to the particular form, the result is the same, as to the insurance companies that you represent?

Mr. Hicks: That is one contention.

Mr. Silber: That is substantially so, excepting for this, Mr. Barrett, that they claim that we have no right, for instance, to deduct the premiums that we paid for reinsurance on some of our risks which we have deducted. Now those taxes come into the public treasury in another way, and that is the thing I would like you to understand.

Mr. Barrett: I understand.

Mr. Silber: That these companies that reinsure make returns of the premiums that they get for that reinsurance. [fol. 23-102] Mr. Barrett: Does Form 16 in its printed conditions give you any space there to claim your exemptions?

Mr. Silber: You mean deductions of that kind?

Mr. Barrett: Yes.

Mr. Silber: No, I do not think it does.

Mr. Barrett: All right, go ahead.

Mr. Silber: I do not think it does.

Mr. Gilbert: This is Form 16 which provides that the company shall make a return, and classify the different kinds of business, so that the Board will know when they

make the return whether they have included all of the kinds of business that the law provides for.

Now, the return as made simply returns so much for gross receipts, so much for expenses, it does not itemize and consequently we cannot tell.

They give us a conclusion. We want the facts upon which the conclusion is based. We want to know the amount of fire insurance, the amount of tornado insurance, the amount of marine insurance, and all of those items so as to see whether they claim that they are not liable for those items or not. So, this return amounts to nothing, it simply is their conclusion of what the net receipts will be if they interpret the law their own way.

Mr. Barrett: Give us each a copy of that form.

The Chairman: Your point is, it is practically an evasion.

Mr. Gilbert: It is an evasion.

The Chairman: By reason of the evasion it is a covering up of the actual results.

[fol. 23-103] Mr. Gilbert: Yes.

The Chairman: So that we could not ascertain, if we wanted to, or whoever was figuring it out, could not ascertain accurately what the results were.

Mr. Gilbert: Yes. The Board of Review has a great deal of business, it has a large amount of work and it is entitled, from every taxpayer and from the insurance companies, among the rest, to the benefit of all of the tax. If you were to undertake on their return to ascertain the true amount of receipts how are you going to get at it? We have a way of getting at it but it is involving an immense investigation. Now, assuming that these gentlemen are wrong in their conclusion, that they won't file this return according to the requirement of the Tax Commission, what is the next program—of course, it is unnecessary for me to tell this Board what the law is because they know more about it than I do, or tell them what their powers are, or what their duty is.

Mr. Barrett: That may not be so. We are willing to learn.

Mr. Gilbert: Well, I don't know; I can tell you what I think.

I think this, that the power to ascertain the amount of net receipts carries with it the power to do everything necessary to arrive at the facts; so you have that power.

Now the Board of Review is not strictly a judicial body, it cannot try all of these cases as they would be tried before a jury. It must try them in a practical manner. If these insurance companies will not make the returns that the law requires, and put upon the Board of Review [fol. 23-104] the necessity of investigating the facts, then the Board must get at the facts in the best way they can.

Now, an investigation has been made by the experts into the taxation of the Aetna Company. In their return made by the county manager, they returned $869,222.06 of gross receipts, not specifying what kind of receipts they are, whether fire or what not; they returned $550,537 as net receipts. They say that is the amount.

Now, not giving us the facts we go to work and find out what the facts are. Here are some of the facts we have ascertained; they have reported to the City of Chicago for the year ending July 1, 1927, which is pretty near the period covered by their net receipts return, $804,000 of fire premiums, after deducting the return premiums.

Now their total gross premiums reported under the net receipts tax question are only $65,000 more.

So, we have to resort to their reports to the State Board. In examining the reports to the State Board we find the following: That for the year ending 1926, which is the nearest we can get at it, their motor vehicle premium receipts were $246,738.28; we find that their receipts from inland navigation insurance, all of which must have been in Chicago of substantially all, amounted to $142,000; we find that their tornado receipts amounted to $254,000, of course a great part of that is in the country.

Mr. Barrett: In a nutshell, with all the information you have we won't try to keep the details in our minds.

Mr. Gilbert: Yes.

[fol. 23-105] Mr. Barrett: If that information you have was to be inserted in the various blanks in this Form 16, what would be the difference between what they return and what return should be as you figure it out?

Mr. Gilbert: As we figure it out, making due allowances as nearly as we can, of course you cannot get at this to a dollar, because you cannot locate all of the insurance.

Mr. Barrett: Yes, we realize that.

Mr. Gilbert: But we make out that the gross receipts for which they should account under their return for this last year are $1,006,113 instead of $869,000. That is a difference of about $140,000.

Mr. Barrett: Let us find out, they may have given according to your conclusions about two-thirds of the whole, is that right?

Mr. Silber: Eighty per cent.

Mr. Gilbert: A little more than that, about 80 per cent.

Mr. Barrett: All right, 80 per cent, or three-quarters of four-fifths.

Mr. Gilbert: Yes.

Mr. Barrett: Does that ratio prevail as to all of them?

Mr. Gilbert: As to all of the companies?

Mr. Barrett; Yes, what is your judgment on that?

Mr. Gilbert: Well, no, I would not say it necessarily did, because in some cases some companies have deducted the reinsurance premiums which we claim they cannot deduct. [fol. 23-106] Mr. Barrett: Let me ask you this, what is your conclusion from your knowledge of the subject as to the average ratio between what they have reported and what they would have reported if they had used Form 16? What is your judgment?

Mr. Gilbert: As near as we can guess, I would say it is about 75 per cent, perhaps less.

Mr. Barrett: In other words, they have reported 75 per cent, in your judgment, of what you believe they should have reported?

Mr. Gilbert: What they should have reported, yes.

Mr. Barrett: And your conclusions come from a 100 per cent basis?

Mr. Gilbert: Yes.

Mr. Silber: Do you understand, Mr. Barrett?

Mr. Barrett: Of whatever the total is.

Mr. Silber: May I point out?

Mr. Barrett: Let me ask a question first, as I want to get some information.

Mr. Silber: Yes.

Mr. Barrett: My questions may not mean anything and they may; but I want to know because I am curious, all of these companies in the past on the basis of your returns on these affidavits paid the tax when bills were issued on your return?

Mr. Silber: No, they have not paid a tax, most of them have not paid a tax.

Mr. Barrett: I am not talking about where we acted.

Mr. Silber: No, I am talking about your question where bills were presented, they have not paid a tax since 1923.

[fol. 23-107] Mr. Gilbert: 1922, you mean?

Mr. Silber: 1922, yes.

Mr. Barrett: Prior to 1922 did you follow the same system that you are following now?

Mr. Hicks: Yes, practically.

Mr. Silber: You mean as to the affidavit?

Mr. Barrett: Yes.

Mr. Silber: Yes.

Mr. Barrett: But since 1922 the bills have been on a different basis?

Mr. Silber: Entirely.

Mr. Barrett: Than your return, isn't that true?

Mr. Silber: The bills have been on two different bases; first on the basis of 100 per cent and second, on the basis of a penalty in addition.

Mr. Barrett: You do not get my point, what I am trying to drive at is this, where we have accepted the returns made by your companies, and they have been spread of record on the warrants and the bills rendered to your companies——

Mr. Hicks: Yes.

Mr. Barrett: Have they paid those bills?

Mr. Hicks: They have.

Mr. Barrett: And you stopped paying them only when these amounts, in accordance with their request, have been placed on the records in excess of what you think should be spread.

Mr. Silber: That is it exactly.

Mr. Hicks: Correct.

Mr. Silber: Now, may I point out the thing——

[fol. 23-108] Mr. Hicks: Wait a minute, he is not through.

The Chairman: May I follow up that question, Mr. Barrett?

Mr. Barrett: Surely, go ahead.

The Chairman: Since 1922 when you did not pay was there any affirmative tender made or statement made in the pleadings admitting certain amounts were due?

Mr. Silber: I would have to think about that because there has been so much litigation—let me answer it as to the Hanover case, because that I know about.

In the Hanover case there was a tender of the amount that would have been due if the tax had been extended on the basis of other personal property, and that amount was the amount that was adopted by the Supreme Court in its last opinion which is now pending on petition for rehearing as being the correct amount of tax.

The Chairman: You do not answer what I want to know, what I want to find out is was there a tender made in court in the pleadings of the amount amounting to a substantial tender?

Mr. Gilbert: No, there was no tender made.

Mr. Hicks: In the pleadings?

The Chairman: Was there an offer made?

Mr. Hicks: No.

Mr. Gilbert: No.

The Chairman: Was there an offer made not technically a tender?

Mr. Hicks: An offer was made.

[fol. 23-109] Mr. Barrett: At any rate let him answer.

The Chairman: Was there an offer made?

Mr. Silber: Not only an offer made but a specific amount fixed as being the amount of tax that we were ready and willing to pay.

Mr. Hicks: In the pleadings?

Mr. Silber: In the pleadings.

The Chairman: And that amount was refused in the lower court?

Mr. Silber: The lower court held that we should pay the amount you fixed.

The Chairman: What do you say the Supreme Court said as to that?

Mr. Silber: The Supreme Court in its first opinion, there was two opinions, the Supreme Court in its first opinion said that was the correct amount extended at 100 per cent.

The Chairman: What is that?

Mr. Silber: Said that was the correct amount extended at 100 per cent, as it was.

Mr. Barrett: What amount?

Mr. Silber: The original amount fixed by the Board of Review.

The Supreme Court of the United States reversed that and held if it was an extension of 100 per cent it was unlawful, unconstitutional and void.

And then the Supreme Court rendered a second opinion in June of 1927, and adopted the figure that we had offered and said that was the correct tax and that was the amount that we should pay and entered a decree.

[fol. 23-110] In effect they reversed with a decree for that amount.

It is now that decree that is under petition for rehearing.

Mr. Barrett: Who filed the petition?

Mr. Silber: We did.

Mr. Barrett: You filed the petition?

Mr. Silber: Yes, we did, because we took the position under the language of the United States Supreme Court decision, which says that after a foreign company has been admitted to do business in the state, it must be placed on the same level with all domestic companies for tax purposes, and as long as domestic companies were not taxed at all, under Section 30 any tax against foreign companies under Section 30 was unconstitutional and void.

Mr. Barrett: Then your position now is as to any offer you made in those pleadings in court fixing the amount, that amount now under your present attitude you would dispute?

Mr. Silber: Yes.

Mr. Barrett: Withdraw it.

Mr. Silber: We would say it is unconstitutional because of Section 30.

Mr. Barrett: I see that.

Mr. Silber: Yes, correct.

Mr. Barrett: Now, you would not be willing to pay that amount?

Mr. Silber: No.

Mr. Barrett: On all other matters, you are taking the position that Section 30 being unconstitutional you won't [fol. 23-111] pay anything under Section 30 as to net receipts?

Mr. Hicks: No, we do not say that.

Mr. Silber: We do not say that. We say that Section 30 furnishes the measure of power of the Board of Review in this matter. That there is no other section of the statute that the Board can act under.

And that Section 30 only requires by its language that every agent make a return of the net receipts, and that the board of assessors should extend that at the same rate as other personal property.

Now, that to our mind, furnishes the whole measure of the power of the Board.

Mr. Barrett: Now, let me ask you this question, so that we get it down to a specific point, supposing the Board of Review should come to the conclusion, after this hearing, for instance, in the Rays Insurance Agency, Matteson, Illinois, Hanover Fire, or just say the agent of your Hanover Fire, I suppose that is the Hanover Fire Insurance Company.

Mr. Silber: Yes.

Mr. Barrett: Most of these affidavits, as I see them, are not drawn up properly.

Mr. Silber: Just for the sake of argument let us assume they are.

Mr. Barrett: Yes. Suppose we should enter of record the amount that is furnished to us by these affidavits, so-called affidavits.

Mr. Hicks: Yes.

Mr. Barrett: And a bill was rendered on them, would [fol. 23-112] you still refuse to pay them on the ground that we have no rights at all under the constitution?

Mr. Hicks: On our return?

Mr. Barrett: Yes.

Mr. Hicks: Yes.

Mr. Silber: I would say this, in answer to that, we would have to wait until the Supreme Court decided the petition for rehearing.

Mr. Hicks: Then we would follow the law.

Mr. Silber: Then we would follow whatever they said.

Mr. Barrett: Then you have come to the conclusion, since 1922—up to which time you paid on the bills rendered, your attitude now is regardless of whatever is done here the matter is subject to litigation to determine whether or not your point is right as to the unconstitutionality of the act?

Mr. Silber: The litigation is practically finished, we have been at it for five years and all that remains to be done is to have the Supreme Court say "no" or "yes", to our petition for rehearing and then the case is ended.

Mr. Gilbert: Now, before we get too far away——

Mr. Hornstein: That is plain, they say they won't pay until they are compelled to.

Mr. Gilbert: Now, before we get too far away——

Mr. Barrett: We are not getting far away, we are getting information.

Mr. Gilbert: Before we get too far away from what the Supreme Court said was the proper amount, let me say the case went up on demurrer and the only thing in the record was the amount.

[fol. 23-113] Mr. Silber: You are not exactly correct, you are 100 per cent wrong.

Mr. Gilbert: Now, I want to set the matter right.

Mr. Hornstein: That is my recollection.

Mr. Gilbert: In the Hanover case and 10 other or 11 other cases the defendants set up that this Section 30 was unconstitutional and void and that they are not liable for any tax at all; then they set up if they were liable the assessment should not be made on the full value, but on a debased value and should be equalized; and then they further set up if it was asessed on the debased value, the tax would be a certain amount.

Now, we answered those bills in each case denying that their estimate of the amount of tax actually due was correct.

We did not admit that, but in the Hanover case which is argued for the purpose of getting this thing before the Supreme Court, and getting a final decision of the validity of the law, we did admit in that case the amount they admitted would be due if the law was constitutional, was correct, but it was not correct. We simply admitted that for the purpose of that one case, and in the other cases we denied it. We answered and admitted that.

Mr. Barrett: Do I understand in the beginning and up until May, 1922, all of these companies were assessed on the assessed valuation as known in our law.

Mr. Hicks: Just like other property.

Mr. Gilbert: Just like other property.

Mr. Barrett: Just like other property?

[fol. 23-114] Mr. Silber: They spread the assessment.

Mr. Barrett: Then this contention came under the special section which is not included in the revenue act, that this should not be spread on the warrant book as assessed

valuations in accordance with personal property assessments or valuations for taxation purposes, but should be spread of record on a 100 per cent valuation and subject to the same rate as personal property.

Mr. Silber: Yes.

Mr. Barrett: Or real estate?

Mr. Silber: Yes.

Mr. Barrett: For instance, in some towns $9 and in some towns $8.57.

Mr. Silber: That is right.

Mr. Barrett: Now, where you have $100,000 of real estate it would be on $50,000, according to our law, but if you had $100,000 in this particular category of taxation it would be $100,000 instead of $50,000.

Mr. Silber: Yes.

Mr. Barrett: Has the Supreme Court decided that question finally now.

Mr. Silber: Subject to the petition for rehearing.

Mr. Gilbert: Subject to the petition for rehearing.

Mr. Barrett: That is, it should be assessed on a 100 per cent basis?

Mr. Silber: No, it should be assessed on the same basis as other property.

Mr. Gilbert: As other property, that is, the 100 per cent this year and prior years one-half and one-third.

[fol. 23-115] Mr. Barrett: I am not talking about this year 100 per cent on all property.

Mr. Hicks: Let me say something that we will all agree on, on the law, we all agree that 100 per cent is out forever, in the future, except as decided by the new law.

Mr. Barrett: The 100 per cent is out by the decision of the Supreme Court of the United States. That is out, we all agree to that.

Mr. Hicks: Yes.

The Chairman: That question could not be before us now because of the particular law that was passed at the last session.

Mr. Silber: That is right.

The Chairman: So we need not argue that any more.

Mr. Silber: That is right.

The Chairman: So it was determined that what we did on that particular basis was wrong.

Mr. Silber: That was what was said.

The Chairman: I am glad to know we were wrong in that, because we are not often wrong.

Mr. Silber: You were wrong in one other thing and that was the Fidelity & Casualty case in the 264th Illinois.

Mr. Hicks: You were wrong there.

Mr. Gilbert: And the Supreme Court was wrong when it made the bull in the Kent case, that made a whole lot of trouble.

Mr. Silber: We are losing track of the big thing that we are all here on, and that is we are here on notice to go back [fol. 23-116] 57 years and file returns. We want to keep the big thing in mind, we don't care about the future, that will take care of itself, because I think the way is cleared for that, but we are here for 57 years in the past.

The Chairman: I think we are getting some place.

Now, let us see if we can analyze this thing a little further.

Mr. Silber: Yes.

The Chairman: In making the demands for the return for premiums for past years, as you put it 57 years, are you asked—is it your contention that we go back and assess or get the figures, so that we can ascertain or obtain figures and make an assessment whether we make that assessment on a 100 per cent basis or a 50 per cent basis.

Mr. Gilbert: You would make that probably on a basis of one-third. You would make it upon the basis of the assessment already made prior to the law of 1898. We all know——

The Chairman: Then, so we agree it would be made according to the holding of the United States Supreme Court on the back premiums of back years?

Mr. Barrett: In other words, they must all be uniform.

Mr. Gilbert: Yes, they must all be uniform.

In other words, for instance, take 1890, we will say you would have to arrive at a guess because it is mostly a guess as to what rate of assessment was put on personal property, but we all know it was not 100 per cent.

The Chairman: Anyway, the principle we understand.

[fol. 23-117] Mr. Gilbert: Yes.

The Chairman: The next question is your point in asking for the fixed net premiums, actual net premiums, for those past years, so that a correct amount may be ascertained and fixed by the Board of Review, so whatever per-

centage of assessment value shall be involved may be fixed, so that an accurate amount and an accurate tax can be fixed. That is the point, isn't it?

Mr. Gilbert: Yes, that is the point.

The Chairman: What is your position with reference to the return claimed to have been made by the various insurance companies covering these past 57 years, on which according to those returns the companies claim they have paid the taxes.

Mr. Gilbert: Our contention is that those returns were wrong and of course as the statute of limitations never runs against the state we have a right to go back any period. The Supreme Court has decided that.

The Chairman: Then your further point would be, assuming in 1890 a return was filed of net receipts of $100,000, and a tax paid upon that, upon whatever basis there was, and then upon an investigation it should be disclosed that the amount should have been $200,000 instead of $100,000, you then claim that we ought to assess the difference?

Mr. Gilbert: You ought to assess the excess and assessed by a basis of valuation that was then in use, say one-third.

Mr. Silber: In spite of the fact if you were called on today, acting under the Revenue Act to assess so-called [fol. 23-118] omitted property of $100,000 as credits for 1890, that we will all agree you would have no power to do it because you had already assessed credits for that year and there is no claim of fraud in this case, never has been, nobody has ever claimed the insurance companies consciously tried to cheat the public revenues of a dollar.

Mr. Gilbert: You may think that.

Mr. Silber: You never claimed it in any pleading that you filed.

Mr. Barrett: Well, that does not make any difference here.

Mr. Silber: No, but they never claimed it in any pleading they filed.

The Chairman: Well, we will take it for granted that they did not attempt to deliberately cheat.

Mr. Barrett: I think you are trying to get an argument.

Mr. Silber: No, I am simply telling you the principle of law that I think applies to this proposition.

Assuming you are acting under the Revenue Act, and that is the broadest assumption you can make, because

under the Revenue Act you have absolute power as a Board of Review to assess omitted property, but the Supreme Court says in order to constitute omitted property all of the classification of that property must have been omitted from the return or from your action of that year.

From the year 1890 you did assess net receipts for the Aetna Insurance Company, which went through and was paid, and therefore you could not if you were acting under your original jurisdiction assess anything as omitted property after that year.

[fol. 23-119] Mr. Gilbert: That is not the law.

Mr. Silber: That is the law.

The Chairman: Isn't there this distinction, in the one case you refer to omitted property and in the other case you are talking about omitted receipts?

Mr. Silber: Yes, but I am assuming you have broader power under the Revenue Act as to omitted property than you have under Section 30, because under Section 30 you have no power.

The Chairman: Would we have to determine according to your argument that omitted receipts under Section 30 of the Revenue Law are in legal effect omitted property under the general revenue law statute?

Mr. Silber: I think you would.

The Chairman: We would have to take some responsibility in determining that.

Mr. Silber: I think you would.

The Chairman: Just one more question, I think we are getting to where I at least am beginning to see a little law.

Mr. Silber: Yes.

The Chairman: If the Supreme Court says yes—you say it will say yes or no.

Mr. Silber: Yes.

The Chairman: If the Supreme Court should say yes would that mean that Judge Gilbert's contention would be correct, that you would then—that the Board would then have a right to go into these past years and get a corrected amount?

[fol. 23-120] Mr. Silber: No, it would be incorrect.

If the Supreme Court of Illinois said yes, the tax should be spread on the basis of other personal property, then our

position is that you have no power under any construction of Section 30 to go back and do anything for past years. You cannot change an entry in the books that have been closed and sent to the collector for 1923. You haven't the power. I say you have not, because that is merely my personal opinion.

The Chairman: I think you are arguing the second branch of it—I am——

Mr. Silber: Maybe.

The Chairman: I am trying to remain on the first branch.

Mr. Silber: Let me remain on it, too.

The Chairman: As I understood it awhile ago the statement was made by one of you men, that it was yes or no up to the Supreme Court on the petition for rehearing.

If the Supreme Court decides your way, which means no, then I take it we could not collect the tax at all.

Mr. Silber: That is correct, that is our belief.

Mr. Hicks: That is right.

The Chairman: But if the Supreme Court decides yes, that is what I am trying to find out, forgetting for a moment the United States Supreme Court decision about modification or construction of Section 30, whether unconstitutional or what it is, omitting that for a minute, but under the Supreme Court ruling in Illinois, would you say then, [fol. 23-121] when you said yes before, that does not mean that we could go back the past 57 years and make a reassessment?

Mr. Silber: That is what I mean exactly. You could not do it.

The Chairman: Those are legal questions that I think we can tie up with ourselves and analyze and simplify the whole thing.

I would like to go along and understand the law as we go along.

Mr. Silber: Well, I have tried to help in any way I can because I have gone into the subject quite extensively for five years. I have tried to see whether I was wrong or right, and I think I am right.

When acting under the Revenue Act, when you go into the past years and give yourselves the broadest construction you have under the Revenue Act, you could not even tax omitted property and omitted receipts because we made

returns and paid taxes in those years on receipts, if I am right.

Mr. Barrett: I will tell you I am not so sure you are wrong in that matter. I don't know anything about it, but I would have to be argued into a decision that if a return was made we would have a right to assess omitted property.

Mr. Silber: For a different amount.

Mr. Barrett: Yes, that would open up a pretty big subject.

The Chairman: I think we are getting right to the starting point, why I asked the question awhile ago, whether omitted receipts are to be considered omitted property.

[fol. 23-122] Mr. Hicks: Will you read me that question?

(Question read as above recorded.)

Mr. Silber: I can cite you to the 11th Ill. on that and give you a little written brief.

The Chairman: Whatever authorities you have you may submit them.

Mr. Silber: I have them for you.

Mr. Barrett: All we are doing at the present time, so far as my present attitude is concerned is considering the 1927 returns. That is all I am thinking of at this particular moment. Is your 1927 return on Form 16?

Mr. Silber: May I make this suggestion on that particular point, it is now our earnest desire that the tax that is spread by this Board shall be a tax that all of us, if possible, can agree is the legal tax that must be paid, and stop any further troubles with the taxing bodies.

Mr. Barrett: Repeat that statement.

Mr. Silber: I say it is our earnest desire that the tax this Board spreads for 1927 is a tax that we all can agree is the legal and proper tax.

In previous years when we have filed the same return we have been met with a 50 per cent penalty merely because we did not file in Form 16, while the matter had been in the Supreme Court to decide that issue.

I think in the first instance any question of a penalty should not be in this tax.

Mr. Barrett: I will say this, if your return was on Form 16, in accordance with the statement by counsel for the

city, my inclination would be to spread it of record as you [fol. 23-123] have returned it. That would be my personal inclination, but we have as I view it from an order directed by the Supreme Court a duty to perform with reference to Form 16.

Mr. Silber: I tried to point out yesterday that the Board of Review was not before the Supreme Court in the case in which that language was used, and all the Supreme Court said in this case was it was within the province of the State Tax Commission to adopt a uniform form in the interests of having general information of the kind that was on Form 16. It did not say that the Board should insist or might insist or should have power to insist on Form 16.

Mr. Barrett: Wasn't there a mandamus petition?

Mr. Silber: Yes, there was a mandamus petition merely to spread the next tax receipts at 100 per cent. That was all that was the question in that case.

The use of Form 16 was something that was obiter practically, in the decision of the case.

Mr. Gilbert: I would like to make a suggestion on the other point.

The Chairman: While I have the question on my mind, following Mr. Barrett, a minute ago I understand you to say as to the 1927 tax you are making returns?

Mr. Silber: We made them, we made them.

Mr. Barrett: They are making them in these affidavits.

Mr. Hicks: We made them.

The Chairman: Are you making them regardless of your position as to the United States Court decision, if Section 30 is void?

[fol. 23-124] Mr. Silber: We have made them in spite of that, made them and filed them with the assessors.

The Chairman: You made your returns on the basis or do you make your returns now in the nature of personal property return or under Section 30, or either of them?

Mr. Silber: Under Section 30. The net receipts as required by Section 30.

We are giving you the full actual net income under Section 30; the only difference between the taxing authorities and ourselves is that we are deducting certain items that we are contending in the State Supreme Court that we are entitled to deduct, such as a proportion of general overhead in Cook County agencies; we are deducting re insur-

ance premiums for the re-insurance company where it files its own returns, and pays taxes on those receipts.

In other words, we are not beating the tax authorities by this method out of a dollar of net receipts. They are getting a full return on all of them.

Mr. Barrett: This of course is understood, there is not anybody don't, the Supreme Court understands it and everybody understands it. There is nobody that is assessed 100 per cent, what the law says they should be assessed, and everybody understands this. Mr. Litzinger made the statement and I made the statement if that were the case we believe here as public officials acting for the good of both the people and the taxing bodies we would cause a panic in our community due to the high rates.

Mr. Gilbert: Yes, and ruin a lot of people.

Mr. Barrett: We must be fair, of course, as to individuals and as to business.

[fol. 23-125] When you say that they average about 75 per cent you have given me a new angle and a new thought.

Mr. Gilbert: Well, I want to answer some of the suggestions made.

Mr. Barrett: Of course I am only talking for myself. I am not endeavoring to express the sentiment or the idea of any other member of the Board of Review.

The Chairman: May I follow that down just a minute and suggest this, if the point of difference now in 1927 is the figures you get from the reports to the city and the state, and their returns as shown here, could you by an auditor get the amounts of difference, the difference, the difference in amount each company; could that be ascertained without any very extended loss of time?

Mr. Gilbert: Well, it might be if we know the amount of each class of insurance.

The Chairman: Well, I understood you could get that from the state.

Mr. Silber: No.

Mr. Gilbert: No, we cannot.

Mr. Silber: You see the difficulty with Judge Gilbert's position is this, he is trying to compare a report filed for all the business that we do in the state, at Springfield, with a report filed here of the business we do in Cook County.

Now, you cannot possibly check up one against the other, because we have thousands of agencies outside of Cook

County in the state, and the state report is the sum total, net receipts.

Mr. Barrett: Is there any way from the general report [fol. 23-126] in Springfield to differentiate between the business in Cook County and the business down state?

Mr. Gilbert: I think so, I think we can get at it; if we cannot get at it, whose fault is it? It is their fault.

Mr. Barrett: I know, but if you tried to find out a reason for everything in the world you would be pretty busy.

Mr. Gilbert: Let me make some suggestion, there has been some statements about the law which have not been correct.

Mr. Hicks: Before you get to the point——

Mr. Gilbert May I say this?

Mr. Hicks: The Board has the point, and I think it is true, and they are going to look it up. They say one thing——

The Chairman: You are not agreeing with us.

Mr. Hicks: I am struggling that way, closer than I was.

The Chairman: May I get this one question in, something keeps bobbing in my mind and I try to satisfy myself by asking these question, it does not indicate my position at all, either one way or the other, I want to ask it for the purpose of some light; suppose on the petition for rehearing, which will determine something, I take it, and probably settle some of the matters involved here, especially as to the past years, suppose—that—and I want Mr. Barrett to hear this—suppose we should defer any action on the matter, all matters except 1927, and wait until the Supreme Court decides the question now up for rehearing, [fol. 23-127] how much would anybody be prejudiced if we deferred action?

Mr. Gilbert: Well, we would not be prejudiced if they decide at the present term, because they will decide the latter part of next week, if they decide it at all.

The Chairman: In other words, if they decide it in the December term of the Supreme Court we will all know about it by that time and this work will not be completed until after the first of the year.

Mr. Gilbert: That is true.

Mr. Silber: Then if they decide it at the February term that will be in sufficient time.

Mr. Barrett: I will say to you gentlemen representing the city my own inclination would be, due to the fact the various taxing bodies are clamoring for revenue, more policemen and so forth, for the purpose of taking care of various vast improvements, improvement bonds and interest due, that if these companies paid on a 75 per cent basis they would have no quarrel with me providing they would say they would pay if we spread it of record on their returns, in view of the fact that you agree on a 75 per cent basis.

The Chairman: If your 75 per cent was 75 per cent of the correct amount.

Mr. Barrett: I am asking them that and they say it is.

Mr. Silber: We say it is much more than 75.

Mr. Barrett: Taking their basis.

Mr. Silber: It cannot be less than it is, much more.

[fol. 23-128] Mr. Gilbert: That is their opinion.

Mr. Barrett: I want to say, I am expressing that opinion only as one member of the Board and I don't know how Mr. Litsinger feels about it. The——

The Chairman: I think you have some influence with the other members.

Mr. Barrett: I do not claim to have, but I am only expressing my thought as a matter of fairness, due to the fact that we have had some experience on this board in relation to these various matters.

Mr. Gilbert: I would like to supplement what counsel has said on the question of the right.

Mr. Barrett: Let me follow that up, but as I understand it you say even on the basis you file you still do not believe you are taxable on that amount under the present law.

Mr. Silber: We think we are providing only that Section 30 is constitutional.

Now, there is the question that arises only on this basis, the Supreme Court of the United States said this, wherever a foreign corporation comes into Illinois and pays it privilege tax to do business in the state, from that moment it must be placed on the same level as a domestic corporation in the state.

Now, our contention has been these domestic corporations paid no net receipt tax at all, the foreign corporations pay 2 per cent privilege tax on all of their premiums for the right to come into the state and do business; in addi-

tion they pay a fire tax, and a fire marshal tax, salvage corps tax and a lot of other taxes. All of these taxes they have to pay.

Our position is because domestic companies were not re- [fol. 23-129] quired to pay those taxes at all, when the Supreme Court said all companies must be placed on the same level, that Section 30 must be necessarily unconstitutional because it did not put the two companies on the same level, because it is an arbitrary discrimination.

If we are wrong on that and the Supreme Court says we are wrong in the petition for rehearing, all right.

Mr. Barrett: Is that involved in this?

Mr. Hicks: Yes, nothing else.

Mr. Silber: That is the very thing.

Mr. Barrett: Is this one petition?

Mr. Silber: Yes.

Mr. Barrett: And it may possibly be decided in this term.

Mr. Silber: It may.

Mr. Barrett: All right.

Mr. Silber: That is the only reservation that we have on the question.

Mr. Hicks: That is all.

Mr. Barrett: Anything else you want to listen to?

The Chairman: I do not think so. I think if it is possible for us to learn the law I do not think there is any necessity for doing something here and then having to retrace our steps.

Mr. Barrett: Let us wait, anyhow, until this particular session of the Supreme Court adjourns.

Mr. Gilbert: Will you permit me to make a suggestion on one of the points?

Mr. Barrett: In the meantime we won't act on it. Now, [fol. 23-130] let us wait and be courteous to the other gentlemen.

Mr. Gilbert: Let me make a suggestion on one of the other points. It has been claimed here because assessments on net receipts have been made in the past, no matter whether wrong or not, the Board is powerless to go back and assess omitted net receipts.

There are decisions of the Supreme Court, there were early decisions which seemed to indicate that that was so,

that if there was any assessment on a particular item, assessment of bonds, there could not be a reassessment of after discovered bonds, but the Supreme Court has gone back on that to the extent of saying that if the discrepancy is large it may be corrected, and furthermore, this Board is bound by the decision in People against Barrett. They say on the other side that you were not parties, but the Board of Review is bound and is bound to take the law as the Supreme Court laid it down.

Mr. Barrett: To-wit.

Mr. Gilbert: The Supreme Court in that case where there had been assessments of net receipts held that you could go back and assess omitted net receipts.

Mr. Barrett: That we could.

Mr. Gilbert: That you could.

Mr. Barrett: Yes.

Mr. Gilbert: Of course, if you could it is your duty to do so under the statute if a proper case is presented.

Now, as far as the meaning of the decision of the Supreme Court of the United States is concerned, you can read it, there is the opinion and it is plain.

[fol. 23-131] Mr. Barrett: I will read it.

Mr. Gilbert: So far as waiting until the Supreme Court of Illinois has decided the petition for rehearing, if they do it this term there is certainly no objection to that.

Mr. Barrett: That may clarify the atmosphere a great deal.

Mr. Gilbert: If they deny a rehearing that ends it.

Mr. Barrett: So far as I am concerned when anybody makes a 75 per cent return here——

Mr. Hicks: It does not hurt you at all.

Mr. Barrett: It does not hurt me at all.

Mr. Gilbert: Here is the difficulty.

Mr. Barrett: I am really astounded at your admission it was 75 per cent.

Mr. Silber: As a matter of fact it was very much more.

Mr. Seeley: You understand of course——

Mr. Barrett: Yes, I understand him, I do because he talks English.

Mr. Seeley: And I talk English too.

Mr. Gilbert: These figures given me show about 75 per cent.

Mr. Barrett: I am taking your word for it and they are your adversaries.

Mr. Gilbert: As I understand it, when the Board arrives at a valuation it generally reduces it some, for instance, if I report property of the value of $100,000 you would probably put it down to seventy-five.

[fol. 23-132] Now, that is all right, because that is a valuation on which you exercise your judgment, and when you exercise your judgment, why, that is the end.

Now, this is no valuation at all, we are entitled to have put on the lists, the law says they shall put on the lists the entire net receipts. Now, when they put those on the lists, you assess the net receipts and then the question is whether you can reduce them by 75 per cent, or not.

Mr. Barrett: Now, they have not admitted at all that they were not 100 per cent, but you say they are at least 75 or 80.

Mr. Gilbert: What I am getting at is this, it is the duty of the Board to put on the list the full amount of the net receipts. That is the law. Now, when they are put on, if you choose to say we will debase the value because other personal property has been debased, that is your privilege, but it is our right under the law to have the correct amount of the net receipts put on the list.

Mr. Hicks: That is true.

Mr. Silber: And that is what we have done with these affidavits.

Mr. Gilbert: We say not.

Mr. Hicks: There is a little more to that statement, because each of them carry an oath before a notary public, but each of them swore that it was the full return.

Mr. Gilbert: They do not tell anything about it, and we should be given an opportunity to get at the truth.

[fol. 23-133] Mr. Barrett: Many oaths are given with easy consciences.

Mr. Silber: Our books are there to back up these returns.

The Chairman: Many oaths are easily swallowed.

Mr. Gilbert: Then, as to the past years I want to make another statement for the information of the Board, that these companies, many of them have omitted from their net receipts fire losses, re-insurance, and any other items they were not entitled to at all, and we are entitled to have that much of the assessment corrected at least. And in some years there was no assessment at all on anything, so the Board under this situation as it exists is at least bound

to examine into the past returns and see whether large amounts have been omitted and have never been taxed.

Mr. Barrett: Isn't it true, also, that same statement of yours applies so far as the schedule of personal property by the individual or individual corporation is concerned, within our jurisdiction, that the law says that they should file schedules.

Mr. Gilbert: If you want my opinion on that subject?

Mr. Barrett: I mean aren't they analogous?

Mr. Gilbert: I think the whole——

Mr. Barrett: Aren't the cases analogous?

Mr. Gilbert: I think the whole system of taxation is an unmitigated fraud.

Mr. Barrett: That is all right. I am not asking your opinion about that; I am asking you whether or not under [fol. 23-134] our present system they are not analogous.

Mr. Gilbert: I don't know; I would not want to express an opinion on that subject.

Mr. Barrett: You do not have to make a very deep research for that. They are analogous, aren't they?

Mr. Gilbert: Of course I would be willing to concede——

Mr. Barrett: If it is not done, then we have a right to use our wits to find out what ought to be done. That is true, isn't it.

Mr. Gilbert: To a certain extent.

Mr. Barrett: In other words you cannot force a man today to file a schedule. Nobody can do that.

Mr. Gilbert: You cannot very well.

Mr. Silber: You can force us to do it.

Mr. Barrett: In other words, you do not file one, do you Mr. Gilbert?

Mr. Gilbert: Yes, I do. I file a schedule every year, a sworn schedule.

Mr. Barrett: Every year?

Mr. Gilbert: Yes, I do.

Mr. Barrett: Then you are an exception.

Mr. Gilbert: Yes, I do, and it is not very large, either.

The Chairman: I want to ask one question here, I want to be clear on, in this Section 30 the title to the act is "An Act to incorporate and govern fire, marine and inland navigation insurance companies, etc." Is it your position [fol. 23-135] and is it clear that insurance outside of fire, marine and inland navigation like tornado, hail, sprinkler

leakage and all that, the premiums coming from that class of insurance, is that subject to tax?

Mr. Gilbert: It is subject to the net receipts tax.

The Chairman: Has that distinction been raised?

Mr. Silber: It has been raised and the Supreme Court has said that after those different classifications and companies were admitted to do business in the state the provisions of Section 30 did cover those items, not casualty, for instance, but tornado, sprinkler, explosion and other things.

Mr. Gilbert: They are all in by separate statutes.

Mr. Silber: Now, we do not raise any question on that. I think you ought to know one thing more before we close this hearing, and that is that 300 suits are pending in the courts of this county for an accounting from the companies on the taxes pending before you, for the same taxes, and they are now asking you to go back and reassess.

In these suits they take the position that a court of equity has power to make an assessment and enter a decree against us for those back taxes, and further say that if we do not pay them to cease our right to do business in this county. I think you ought to know that.

Mr. Gilbert: What do you contend?

Mr. Silber: We contend that there is no equity, no jurisdiction in a court of equity to do that.

Mr. Gilbert: Clear.

The Chairman: The only thing we can say is that some lawyers are monopolizing all of the business.

[fol. 23-136] Mr. Silber: I wanted you to know what is happening there.

Mr. Hicks: But they are doing it under protest.

Mr. Silber: They are dragging us into court on 300 cases and they are trying to do in court what they are asking you to do.

Mr. Hicks: Yes, and they are all pending.

The Chairman: That is all.

DECEMBER 28, 1927

There were present the following:

Commissioner Charles V. Barrett.

Hon. Samuel A. Ettelson, Corporation Counsel, by Mr. Hiram T. Gilbert, appeared on behalf of the City of Chicago.

Messrs. Hicks & Folonie, by Mr. Paul H. Heineke, appeared on behalf of certain insurance companies.

Messrs. Silber, Isaacs, Silber & Woley, by Mr. Samuel Levin, appeared on behalf of certain insurance companies.

Mr. Barrett: Who is here in response to the notification about these insurance companies?

Mr. Gilbert: I am here.

Mr. Barrett: Is the other side represented?

Mr. Gilbert: Yes.

Mr. Barrett: Is Mr. Silber's office represented here?

Mr. Levin: Yes, but Mr. Silber is in Washington.

Mr. Barrett: Are your familiar with the subject-matter? [fol. 23-137] Mr. Levin: Only in a general way.

Mr. Barrett: Whom do you represent?

Mr. Heineke: Hicks & Folonie, and Mr. Hicks is sick in bed.

Mr. Barrett: Do you understand the matter?

Mr. Heineke: No.

Mr. Barrett: What is your idea as to the Supreme Court denying the petition for rehearing?

Mr. Gilbert: They sustain the law——

Mr. Barrett: That is, on the question of net receipts?

Mr. Gilbert: Net receipts, and also the net receipts must be entered on the tax list, but there is no valuation of net receipts, but they are entered on the tax list at the actual amount, and they are debased like other personal property.

Mr. Barrett: Of course, in the past we have had the controversy as to whether they should be taxed on the basis of 100 per cent, which we call the full value, or on the basis of the assessed value, according to the provisions of the statute.

Mr. Gilbert: As I say, the net receipts are entered on the list at the full amount.

Mr. Barrett: Yes. Of course, this year they are all entered on a 100 per cent basis.

Mr. Gilbert: No, we claim they are only entered for about 75 per cent.

Mr. Barrett: You don't understand, we make 60 per cent for equalization; they are put on at their full value.

Mr. Gilbert: Yes.

[fol. 23 138] Mr. Barrett: All right, the Supreme Court has upheld what we have done in the past, except that we put them on at 100 per cent value and it should have been a 50 per cent, is that right?

Mr. Gilbert: That is right.

Mr. Barrett: All right, and if we put them on in accordance with their return to you, my understanding is that they have given practically 75 per cent return of the full value?

Mr. Gilbert: We think that is about right.

Mr. Barrett: You think that is about right?

Mr. Gilbert: Yes.

Mr. Barrett: In other words, it is your opinion that if they had filed it on Form 16 in accordance with the way you would like them to do it, as representing the Taxing Body of the Municipality, it is your opinion that there would probably be about a 25 per cent increase to make it 100 per cent full value, as their return?

Mr. Gilbert: Yes.

Mr. Barrett: Now, what did the Supreme Court say with reference to their filing Form 16?

Mr. Gilbert: They haven't said anything since the Barrett case.

Mr. Barrett: And the Barrett case said they should?

Mr. Gilbert: It said that was a proper form.

Mr. Barrett: Now, it is results that you are asking for?

Mr. Gilbert: That is what we want, results, without too much trouble.

[fol. 23 139] Mr. Barrett: Is there anything else now in contemplation to be litigated on these matters, if we should enter on our warrant books the amounts that they have given to you in their affidavits? As I understood it, they said there was something else to be litigated the other day.

Mr. Gilbert: Not on our side. They want to contest past years, that is, years prior——

Mr. Barrett: I am not talking about that; I am talking now on this particular year's assessment.

Mr. Gilbert: As I understand it, they contend the Act is unconstitutional.

Mr. Barrett: Now, what is there on that point?

Mr. Gilbert: Their contention is that the entire act is

unconstitutional, that the Supreme Court of the United States has practically so held.

Mr. Barrett: On the basis of what?

Mr. Gilbert: Because it is in violation of the Fourteenth Amendment.

Mr. Barrett: That there is a discrimination?

Mr. Gilbert: Yes.

Mr. Barrett: Do they claim there would be a discrimination in the matter even under the basis of our present law?

Mr. Gilbert: No.

Mr. Barrett: In the past, of course, it was understood that they should go in on a 100 per cent basis because it was a specific statute, in the nature of a tax, rather than an assessment of personal property. Now, of course, that is all eliminated. All property now goes in on a 100 per cent [fol. 23-140] basis, which, of course, affects the bonding power. Now, with that, so far as our present assessment is concerned, in your opinion, eliminating it from the possibility of being unconstitutional——

Mr. Gilbert: There is no contest about that. If there is to be an assessment at all, it is to be on full value.

Mr. Barrett: In accordance with other personal property?

Mr. Gilbert: Yes, exactly.

Mr. Barrett: Now, they made returns on affidavits they prepared for themselves. You have insisted that they should make returns on Form 16, which they have refused to do. We at one time were mandamused for the purpose of having the return on Form 16. Now, since that time we have endeavored to force them to do it, keeping good faith with the order of court. They have refused to do it. In your opinion, is there any method by which the Board of Review can force them?

Mr. Gilbert: The only method is by penalizing them.

Mr. Barrett: All right, how can we penalize them?

Mr. Gilbert: Just as you could penalize anybody who comes in here for relief.

Mr. Barrett: In other words, if we cite you in for the purpose of raising the valuation of your personal property or showing cause why it should not be raised, if you don't give us any information, we take the best information we can get and make the assessment?

Mr. Gilbert: Yes, and you can add a penalty, too.

[fol. 23-141] Mr. Barrett: You mean a 50 percent penalty for failure to file a schedule?

Mr. Gilbert: We don't claim that.

Mr. Barrett: I know you are not asking that. All right, we have gone through all that. We have cited them in, and they have given us an affidavit which, of course, isn't in conformity with Form 16. There is no physical way by which we can force them to file that particular kind of schedule.

Mr. Gilbert: No practical way.

Mr. Barrett: No practical way to do it. Now, after that is all exhausted, we find they have returned what would appear to be a 75 per cent return of the true net receipts. Now, if we put these figures on our books at 75 per cent basis, what is your opinion as to that?

Mr. Gilbert: I think that would be about right, provided it isn't debased after it is put on.

Mr. Barrett: Well, we will not do that. Well, whatever we put on will be in accordance with the schedule they file, with the affidavit they file.

Now, is there anything else you gentlemen would like to say to me? You have listened to what I have said. Is there any enlightenment you can give me? I am talking for the purpose of the record you are making here. I am talking now to the attorneys who represent these various insurance companies.

Mr. Heineke: Mr. Barrett, I think the record should show that notice was given to the insurance companies by telephone this morning, and that Mr. Hicks is sick in bed and that Mr. Silber is in Washington.

[fol. 23-142] Mr. Barrett: No, notice was given to the insurance companies some time ago in accordance with the law that provides for notice, and they were in here. This is in the nature of a subsequent hearing which we agreed to have after the Supreme Court had handed down their decision on the petition for rehearing, which they have done, and denied it. I took it for granted that they had some hope that the Supreme Court would grant the petition for rehearing, which would again leave the matter in a position where we wouldn't know what to do. Now, then, the petition for rehearing which they filed has been denied, leaving the law as per the opinion handed down some time ago. I

am sure that the Board, under those conditions, will do as I said here a moment ago. That, of course, will come to the Board's attention very soon, and we will give it immediate action.

Now, is there anything else you are interested in regarding insurance matters?

Mr. Gilbert: Nothing that I know of.

Mr. Barrett: I don't think these gentlemen are interested in the personal property feature of insurance companies.

Mr. Gilbert: Well

Mr. Barrett: You may say to the Corporation Counsel, that we have disposed of this matter, but if there is anything else they want to say to us, we are here, but we want to get it immediately.

Mr. Gilbert: All right.

Whereupon the hearing was adjourned.

[fol. 23143] Herman Seeley, recalled for defendant, testified as follows:

Direct examination:

By Mr. Silber:

There were four separate notices that went out to the insurance companies from the Board of Review to appear on December 15, 1927, in connection with these omitted net receipts. One of them dealt with 1869 to 1898, one with 1898 to 1922, another with 1922 to 1927, and the fourth was for the current year of 1927. These notices were prepared by me and submitted to Mr. Gilbert, who submitted them to the Board of Review, which in turn referred them to Mr. Massena; after that they were issued. These were the only notices sent out.

The only contract that I have for contingent fees is the one executed with More in regard to the county. I haven't it with me now, but I can get a copy of it. I have no copy whatever of the contract with the City.

STIPULATION

Stipulation between the parties providing as follows:

1. That defendant may introduce any evidence which would be admissible in equity under appropriate pleadings.

2. That defendant may introduce any evidence which would be competent in support of a bill to restrain the collection of the taxes, the plaintiff waiving any objection to the jurisdiction of the court to entertain and give effect to any equitable cause of action or defense in favor of defendant.

[fol. 23-144] 3. The defendant shall have the right to have the court enter such judgment or decree as may be appropriate to and in conformity with the evidence so that the defendant can have the same relief to which it would be entitled under a bill to restrain the collection of the taxes.

4. That defendant may offer evidence proving that (a) the assessment of the taxes by the Board of Review was fraudulent and void, (b) that the Board of Review had no power to assess net receipts taxes for the years in question as omitted net receipts or as omitted property taxes, (c) that the omitted net receipts taxes assessed for the year in question were void and uncollectible, (d) that Section 30 of the Act of 1869 is unconstitutional and void, and (e) that the collection of the taxes in this case should be perpetually enjoined.

5. That a consideration of the stipulation is that the defendant waives trial by jury.

6. That either party can have the right to offer testimony proving or tending to prove any fact within the issues made by the pleadings not otherwise expressly provided for.

Stipulation setting forth in substance that during the years in question various non-incorporated foreign associations, various individuals, various so-called Lloyds, and various domestic fire insurance companies were lawfully engaged in transacting the business of fire, marine and inland navigation insurance in Illinois in competition with

the defendant and all other foreign incorporated fire insurance companies during that period lawfully transacting the business of fire, marine and inland navigation insur-
[fol. 23-145] ance companies, and that said non-incorporated foreign associations, individuals, Lloyds and domestic insurance corporations during said years were not assessed for taxation upon their several net receipts covering fire, marine and inland navigation insurance risks assumed by them in Illinois, or upon any real or personal property other than net receipts like all other property owners and taxpayers, and that said foreign stock fire insurance companies were assessed for taxation upon their net receipts derived from such competitive business; that foreign casualty insurance companies also carried on such competitive business and were not taxed on their net receipts derived therefrom.

W. H. Roadifer, called for defendant, testified as follows:

Direct examination:

I have already testified in this case on behalf of the National Fire Insurance Company, the Mechanics and Traders Insurance Company and the Transcontinental Insurance Company.

The gross receipts of each of the returns for each of the years in question of those companies as filed were correctly made as far as the amount of the gross receipts from fire, marine and inland navigation insurance premiums were concerned. The return showed correctly the amount of gross receipts and the expenses that were deducted in each year of each company for each return. Those expenses were correctly set forth in our return for each company; that is, to the best of our ability to produce them. I was personally in charge of that work. The net receipts shown [fol. 23-146] by each return for each of those companies and each year as filed were the correct showings of the actual net receipts from those sources from each company for each year. I was controller of the company during that period in charge of the accounting.

The National Fire Insurance Company had office furniture and fixtures on which they made a separate return

and paid taxes. The only thing unpaid and the only property assessed by the Board of Assessors and the Board of Review during those five years was the actual net receipts and nothing else excepting the tangible property I have testified to.

Cross-examination:

I know from the records that the gross receipts which I put in those returns were the only gross receipts received. The records were those kept by an insurance company, which are registers or journals which showed the business in the various agencies and stated the business that our company figured in the agencies of Cook County. I did not keep the books with my own hands. I have been during that period comptroller for many years, I have been the chief accountant and am still the chief accountant. I am familiar, absolutely, with the returns from the books and records of our office. I am certain they are correct so far as the books show, and the books show the correct business.

The making up of the statement from the books was done by employes under my direction. I have every reason to believe that it was absolutely prepared in a correct manner.

We never made an reported figures direct to the Board [fol. 23-147] of Review. The following form was used by me:

"Agent return of Alexander Wolf & Company, 175 West Jackson boulevard, Chicago, Illinois, National Fire Insurance Company of Hartford, Connecticut, an insurance company incorporated by authority of State of Connecticut of the net receipts of such agency for the year ending April 30, 1926: Gross receipts (gross premiums less return premiums); $49,505.09; expenses, $20,495.10; net receipts, $29,009.97."

That was the form used. The expenses are made up of the various things that go to make expenses of operating insurance companies, such as commissions, postage, taxes, salaries and local board taxes and a pro rata proportion of salaries, office rents and all of those things that are necessary in the operation of insurance companies, recognized expenses in operating any business.

The commissions were those paid to the local agents. They vary in Cook County, and, in fact, in the state. During this period they ran from 20 per cent to 35 per cent of the premiums. We may have paid the same agent 20 per cent, part 25 per cent and part 35 per cent. We paid some of them as low as 20 per cent and from that it ran up from 20 per cent to 35 per cent.

I cannot say what the commission arrangement was. It was the arrangement of allowance of commission as prescribed by the Chicago Board of Underwriters and I am not thoroughly familiar with the rate. I could not tell you what proportion of the gross premiums paid 20 per cent and what paid 25 per cent or what paid 30 per cent. I could [fol. 23-148] not tell the average commission paid. It averages different in different agencies. There were not very many telegrams in Cook County. I don't know what percentage of gross receipts would be consumed by that item. The fire department tax is fixed. That is 2 per cent of the fire premiums. The Section 30 tax was whatever the tax was extended on the net receipts. It runs on the average pretty close to 2 per cent. It would not in those years when we did not pay the tax.

Q. Did you decrease your insurance premiums those years from what they had been before or did you raise them? A. I think our premiums were on the increase in those years.

They were more from 1923 to 1927 than they had been the five years previous. We were a growing company up until recently. The fire patrol tax amounted in the neighborhood of 2 per cent of the fire business on the Cook County business.

The expenses we included in that expense other than commissions, telegrams, postage, fire department tax, fire patrol assessment and Section 30 tax, were a ratable proportion of the salaries of the officers, the salaries and expenses of men whose duties are to work in Cook County exclusively. We included the expenses that were spread from month to month on our books for our own information as to cost of operating the company, which included salaries; that is, what could be called overhead expense, salaries, rents, etc.

The books from which I made up the returns that I filed with the Board were kept in the usual and ordinary course

of the business. They are true and correct as far as I know.

[fol. 23-149]. Redirect examination:

It is a fact that during that period that the commissions beginning at 20 per cent are graduated only upon the different classifications of business, so that upon a certain type of insurance written by an agent he gets a certain agreed commission and upon a certain other type of insurance or risk he gets a certain different rate of commission. So it depends entirely on the aggregates of the different classifications as to how you could arrive at an average. Without these different aggregates and classifications we could never get an average for the commission. We would have to take the total premiums and the total of the classes to get the total commissions and then get the ratio of the commissions paid to the premiums written. It is something we would have to reduce to calculation before I could give any answer, because an agency might write all dwelling house business which would be of the highest rate. That agent would average 30 per cent if that is what he did. The lowest rate of commissions is 20 per cent. That applies to most downtown risks in the loop. It applies on what we call special hazards like a creamery plant; that is a non-preferred business, and foundry and machine shops.

The downtown insurance gives the agent the lower commission. That was the 20 per cent commission class. I could not say what part of the total business would allow 20 per cent commission. That would differ with various companies. Dwelling houses and churches would get the 35 per cent commission and household furniture risks. Apartment buildings are so-called preferred classes. The rates on that business are lower. A dwelling house is much cheaper than a creamery or something like that.

[fol. 23-150] Henry Rankin Morrison Smith, called for defendant, testified as follows:

Direct examination:

I live at 69 East Division street and for some years have been connected with the so-called Firemen's group of insurance companies, which includes the Firemen's Insurance Company, the National Ben Franklin Insurance Com-

pany, the Girard Fire & Marine Insurance Company, the Superior Insurance Company, the Concordia Insurance Company, the Milwaukee Mechanics Insurance Company and the Capital Fire Insurance Co. I have been twenty-two years with the Firemen's Insurance Co. and varying periods with the others.

During that period and particularly 1923 to 1928, inclusive, I was assistant secretary and secretary, and second vice-president with the Firemen's.

I was in charge of preparing and filing the annual net receipt returns for the Firemen's, Girard, Mechanics and National Ben Franklin during that period and for the Superior and Concordia during part of that period. I didn't do the manual work. I did not personally verify the results, but I checked the final return. These figures were taken from the books and records kept in the usual and ordinary course of business of each company under my supervision and so far as I know were true and correct. To the best of my knowledge the amount stated as gross receipts in each return was the true and correct amount of gross receipts of each of the said companies for fire, marine and inland navigations premiums, which is also true in re-
[fol. 23-151] gard to expenses and amount of net receipts.

During those years the only property that the companies had in Cook County was the net receipts, excepting that in the last two years they all had physical property, in which they all participated. We made separate returns and the property was distributed among them and taxed separately. There is no tax remaining unpaid by any of these companies excepting the net receipts.

Cross-examination:

I did not personally keep the books; they were kept by other employees in the ordinary course of business and were assumed correct. We got the gross receipts from our books. Our formula for expenses is to take what we call specific expenses that we allow agents and then take a pro rata according to the premium income of what we call overhead or home office expense. I could not say what percentage of the gross expenses were consumed by commissions, telegrams, postage, fire department tax, fire patrol assessment and Section 30 tax, etc. The commissions paid

the agents varied from 20 per cent up, according to the character of the risk. The lower commission goes on the bigger risk, special hazard. The higher commission would go on what we call preferred risk where the fire hazard was considered less. The bulk of our premiums comes from loop risks. I can't say off-hand what commissions were paid in those years, but I can get the information. I can't tell how much telegrams, postage, etc., would consume. The fire department tax would be two per cent. I can't say [fol. 23-152] what the fire patrol assessment was throughout that period, but it must be 1½ or 2 per cent at present.

Some of the agents hire sub-agents. They write the policies and issue them and sell and assemble the business. The principal agent takes that expense out of his commission; his compensation is his commission. We do not pay the salaries of the sub-agents' clerks or his office rent, telegrams and postage. He pays everything except the fire department, fire patrol and Section 30 taxes. His whole compensation is what we pay him in commissions. Out of his commission he pays his own clerk hire, telegrams, postage, office rent, etc.

I could not tell what proportion of the gross premiums the agents gets 20 per cent of.

The commission is charged in the agent's account at the different rates and the total of that commission becomes a credit to the agent and he remits everything to the principal office excepting his commission and some postage that we allow on our policies.

I don't know what the percentage was of expense to gross receipts in any of these companies without referring to the books at the office.

In order to avoid taking unnecessary testimony it is here agreed that the testimony of the witness H. R. M. Smith shall be taken to be the testimony of the witnesses representing the other companies excepting as to the amounts of net receipts and percentages.

STIPULATION

Stipulation that the tax rates in the City of Chicago for the years 1923 to 1927, inclusive, with only slight and un-

substantial changes were as follows: 7.91 for 1923, 8.40 for [fol. 23-153] 1924, 9.05 for 1925, 9.29 for 1926, and 4.85 for 1927.

STIPULATIONS

Stipulations showing that for the years 1923 to 1926, inclusive, the defendant made certain returns of the net receipts, the Board of Assessors and the Board of Review made certain assessments of said net receipts, appended thereto the necessary affidavits, returned the same to the county clerk, who extended the taxes thereon at the rates determined by him, made up the collector's warrants and delivered the same to the county collector, who returned the taxes unpaid and delinquent, and also showing what the taxes would have been had they been extended upon 50 per cent of the net receipts or upon 30 per cent of the net receipts.

The figures thus presented in the stipulations for the respective years were as follows:

1923

Defendant's return of net receipts	$85,926.00
Board of Assessors full value	85,926.00
Board of Assessors assessed value	42,963.00
Board of Review assessed value	85,926.00
Tax extended	5,853.40
Tax if extended on 50% of net receipts	3,401.00
Tax if extended on 30% of net receipts	2,117.00

1924

Defendant's return of net receipts	$139,035.00
Board of Assessors full value	139,035.00
Board of Assessors assessed value	42,963.00
Board of Review assessed value	139,035.00
Tax extended	7,019.48
Tax — extended on 50% of net receipts	5,880.00
Tax if extended on 30% of net receipts	3,528.00

[fol. 23-154]

1925

Defendant's return of net receipts	$153,315.00
Board of Assessors full value	153,315.00
Board of Assessors assessed value	76,657.50
Board of Review assessed value	153,315.00
Tax extended	5,059.58
Tax if extended on 50% of net receipts	6,937.45
Tax if extended on 30% of net receipts	4,599.45

1926

Defendant's return of net receipts	$96,853.00
Board of Assessors full value	96,853.00
Board of Assessors assessed value	48,426.50
Board of Review assessed value	96,853.00
Tax extended	6,312.96
Tax if extended on 50% of net receipts	4,459.00
Tax if extended on 30% of net receipts	2,694.00

The foregoing statement with respect to assessments and extensions of taxes for the years 1923 to 1926, inclusive, are not to be construed as meaning that no other assessments or extensions of taxes were made for either of said years, but are to be construed as not in conflict with the testimony introduced showing that other and additional assessments of the same net receipts and extensions of taxes thereon were made by the Board of Assessors and the Board of Review for said years.

STIPULATION

Stipulation showing that for the year 1927 the defendant made a return of its net receipts, the Board of Assessors and the Board of Review made certain assessments of said net receipts, appended thereto the necessary affida-
[fol. 23-155] vits, returned the same to the county clerk, who extended the taxes thereon at the rates determined by him, made up the collector's warrants and delivered the same to the county collector, who returned the taxes unpaid and delinquent, and also showing what the taxes would have been had they been extended upon 60 per cent of the net receipts.

The figures thus presented in the stipulation are as follows:

1927

Defendant's return of net receipts	$76,291.00
Board of Assessors full value	76,291.00
Board of Assessors assessed value	38,145.50
Board of Review assessed value	76,291.00
Tax extended	5,895.19
Tax if extended on amount of net receipts	3,686.00
Tax if extended on 60% of net receipts	2,220.00

The foregoing assessments for the year 1927 were entered under the head of "credits" in the regular personal property assessment book used for the assessment of all kinds of personal property other than net receipts of foreign, fire, marine and inland navigation insurance companies and were not entered in the special assessment book used for the assessment of net receipts of foreign, fire, marine and inland navigation insurance companies. Such assessments were on the same net receipts covered by the subsequent assessment made in 1928.

It is also stipulated that the defendant received no notice from the Board of Review of any hearing or any proposed hearing upon any proposed assessment or revision of net receipts on so-called omitted net receipts for either of the years 1923-1927, inclusive, other than that given prior to [fol. 23-156] the hearing before the Board of Review of December 15, 1927, and that said defendant did not know of the imposition of any so-called omitted net receipts taxes for said years until the filing of this suit against it.

It is also stipulated that the loss ratio of the defendant for said tax years, 1923-1927, were not less than 45 per cent of its premium received in Cook County; that is, that out of every dollar of premium received by defendant in said county it was required to pay at least 45 cents in losses arising in said county. There was a loss ratio of all stock fire insurance companies in Cook County of not less than 45 per cent of gross premium receipts.

The defendant never paid any of the taxes mentioned in the foregoing stipulations covering the alleged assessments therein mentioned for either of said years 1923 to 1927, inclusive. No suits, other than the present suit, were ever brought to collect any of said taxes.

Proceedings by petition to the Director of Trade and Commerce to cancel and revoke the license to do business

in Illinois of each defendant for nonpayment of said taxes extended on the same assessments made by the Board of Review in 1928 for the years 1923 to 1927, inclusive, which are involved in this suit, were instituted by the plaintiff on February 13, 1930, and said petition was denied by the Director on March 11, 1930, and no other proceedings were instituted to enforce the collection of the same or any part thereof. The assessment of $76,291 made by the Board of Review for the year 1927 was made under the heading of "credits," as shown by the evidence in this case. The validity of all of the assessments made by the [fol. 23-157] Board of Review for the years 1923 to 1927, inclusive, and the extensions of the taxes thereon have always been disputed by the defendant.

HERMAN B. SEELY, called for plaintiffs, testified as follows:

Direct examination:

I have made an investigation of the statistics for the purpose of showing the average of expenses of fire insurance companies in the United States in the years 1923 to 1927.

The plaintiff then offered to prove by Seely by statistics in use by insurance companies and satisticians that the average expense of all fire insurance companies in the United States for carrying on their business outside of fire losses amounted to the following percentages of their gross premiums: In 1923 to 42.10 per cent; in 1924 to 42.10 per cent; in 1925 to 44.17 per cent; in 1926 to 44.41 per cent, and in 1927 to 45.5 per cent.

(To which offer of proof the defendant objected and the court sustained the objection; to which ruling of the court the plaintiffs then and there excepted.)

I have examined the returns of the gross receipts of the 17 companies in question with their net receipts for the purpose of ascertaining the percentage of gross receipts charged by them as expenses as far as I could from the record. The paper now shown me is the result of my comparison.

[fol. 23-158] Cross-examination:

These figures were prepared from actual returns of the companies on file with the Board of Assessors for the years 1924, 1925, 1926 and 1927. I did not have the year 1923 so I did not make it. This paper shows the per cent of expenses deducted from gross receipts in making the showing of net returns. When I prepared each of these figures I had before me the actual returns for 1926. For the other years I had the copies I made of the actual returns. I made these copies at the time they were filed with the Board of Assessors.

In each case on this list where there is a figure opposite a company's name under a column showing a year I had either the original return or a copy made from the original return at the time the original return was filed. Where there is a blank left in this paper that indicates that I had no return or copy for that particular year.

The paper referred to, though objected to by the defendant, was here introduced in evidence. It shows that the Concordia Fire Insurance Company, the defendant, for the year 1924, in arriving at its net receipts deducted 52 per cent from its gross receipts, for the year 1925 it deducted 48 per cent, for the year 1926 it deducted 50 per cent and for the year 1927 it deducted 54 per cent.

OFFER IN EVIDENCE.

Plaintiff's counsel then read in evidence extracts from a bill in chancery filed by National Fire Insurance Company in Superior Court of Cook County in April, 1924, to enjoin the collection of the net receipts tax for the year 1923 ex-
[fol. 23-159] tended against it. These extracts set forth, among other things, the following:

Complainant is a corporation authorized to insure those having insurable interests in (a) property (whether upon land or water), (b) rents, use and occupancy, (c) against hazards of fire, lightning, hail, tempest, earthquake, explosion (except upon steam boilers and pipes, fly wheels, engines and machinery connected therewith or operated thereby), water, breakage, leakages, risks of ocean, lake, river, canal and inland navigation, transportation, hazards of windstorms, tornadoes, cyclones, transportation, and in

addition, upon automobiles or motor vehicles, against the hazards of theft and collision:

During the year April 30, 1923, complainant exercised said corporate powers in Illinois and collected and received premiums upon policies of insurance by it written through its Cook County agencies and against risks aforesaid, which action was in nowise prohibited by the State of Illinois and was consistent within the policy and laws of the state.

The statutes of Illinois provide for the chartering and organizing under the law of said state of fire, marine and inland navigation insurance companies having their domicile in Illinois (hereinafter referred to as domestic fire insurance companies) which domestic companies are authorized and empowered to organize by the laws of Illinois and to make insurance on the same kinds and character of property and against the same hazards and risks as foreign fire insurance companies; that during the year ending April 30, 1923, both domestic fire insurance companies and foreign fire insurance companies made insurance in Illinois [fol. 23-160] upon property against hazards and risks aforesaid and upon the same character of hazards and risks; that domestic companies and foreign companies charged, demanded and received during all of said period the same, or approximately the same, premiums as foreign fire insurance companies charged, demanded and received for insurance upon the same property or for the same kind, form and character or type of hazard or risk; that foreign fire insurance companies are in direct competition with domestic fire insurance companies in making insurance against the hazards and risks aforesaid.

The statutes of Illinois provide for chartering casualty insurance companies and for the licensing of foreign casualty insurance companies to transact the business of casualty insurance; that casualty companies, both domestic and foreign, are authorized to and during the said year did within the state make insurance, among other things, upon automobiles or other motor vehicles against all or any of the risks of fire, lightning, windstorms, tornadoes, cyclones, explosions, etc., and also made insurance against loss or damage by water caused by the breakage or leakage of sprinklers, etc., and upon growing crops, livestock or other property against loss or damage by lightning, windstorms, hail storms and cyclones.

The power so exercised by said casualty companies are the powers of insurance, which were exercised in Illinois by the complainant and by other foreign fire insurance companies; that casualty companies, both domestic and foreign, during that year charged, demanded and received the same or approximately the same premiums as foreign fire [fol. 23-161] insurance companies did for a like amount of insurance upon like hazards of the kind aforesaid; that foreign fire insurance companies, including complainant, are, and during that year were in direct competition with casualty insurance companies, domestic and foreign, in the business of making insurance on the property of the kinds, form and character and types of hazards thus described.

The aggregate amount of the premium received by complainant and other foreign fire insurance companies for and on account of insuring property of the kind, form and character and of the type of hazards thus referred to (and which may also be insured by casualty insurance companies, both domestic and foreign) constitutes a large and substantial percentage and part of its and their receipts in the State of Illinois and within the County of Cook and Town of South Chicago collected by complainants and their respective agencies; and the aggregate amount of premiums received by casualty insurance companies, both domestic and foreign, for and on account of insuring the property of such kinds, form and character, constitutes a large and substantial percentage of their net receipts; that during the year in question there were approximately 147 foreign casualty companies actually transacting business in Illinois, and among other things which during said year were insured by foreign insurance companies and likewise by casualty insurance companies, domestic and foreign, are and were automobiles or other motor vehicles, stationary or operated under their own power, which were insured respectively by foreign fire insurance companies and casualty companies, both domestic and foreign, against risks and [fol. 23-162] hazards of windstorms, tornadoes, cyclones, etc.; that during said year there were approximately 950,000 automobiles and motor vehicles in the State of Illinois, a large part of which were located in Cook County and in the Town of South Chicago; that foreign casualty insurance companies for the year 1923 received upwards of $1,000,000 in gross premiums for the insurance of auto-

mobiles and other motor vehicles; that complainant is informed and states that foreign casualty companies in Illinois additionally received during 1923 a sum not less than said sum last mentioned in gross premiums for other types of insurance which they are so authorized to and permitted to and during said period of one year did write by concurrent authority and power and by like permission of the State of Illinois given to foreign casualty companies and to foreign fire insurance companies.

For many years prior to 1923 all the kinds of property and all the various hazards above mentioned have been insured not only by fire insurance companies, foreign and domestic, and by casualty companies, foreign and domestic, but also by other insurers and during said entire period said various types and kinds of insurance have been written and made up on the said various kinds, classes and characters of property upon the said various hazards mentioned, by individuals and associations of individuals and groups of individuals and groups of persons styling themselves Lloyd associations and such persons, associations and aggregations of persons were wont and accustomed to and did write insurance identical with foreign fire insurance companies and in direct competition with such foreign fire insurance companies.

[fol. 23-163] The personal property of taxpayers generally throughout Cook County for 1923 and for many years prior thereto had been generally reduced, debased, equalized and set down in the column headed "full value" at not exceeding 60 per cent of its true actual and market value and one-half of the amount so set down was set down in another column headed "assessed value"; that the Board of Review for the year 1923 thus uniformly debased the value of personal property excepting the net premium receipts of the complainant and other foreign fire insurance companies, which said net receipts were purposely, designedly and intentionally left at their full value and at such amount entered in the assessment column with the design, purpose and intent that complainant should be subjected to a rate of taxation greater and different than that to which other personal property in South Chicago and Cook County was subjected to.

This Bill was filed in the Superior Court of Cook County on April 3, 1924; a similar Bill containing these same al-

legations, except the amount of the assessment and the tax, was filed by the Hanover Fire Insurance Company and nine other companies. The Hanover Fire Insurance Company went to the Supreme Court of the United States and its allegations were considered by the Supreme Court of the United States when they held the law unconstitutional.

Mr. Gilbert: Do you want to know the purpose of this? I think you are entitled to know. You are now alleging in your stipulation that these casualty companies and Lloyds and different things are competitors in all these various [fol. 23-164] lines of business and you are alleging that now as one of the grounds of having the law adjudged unconstitutional when it is a ground that I say was passed upon by the Supreme Court of the United States and by the Supreme Court of Illinois.

Mr. Silber: That is true. We are alleging that as one of the grounds of unconstitutionality of Section 30 if we ever get that far.

Complainants here offer in evidence Tax Commission Form 16 which is as follows:

Mr. Silber: Objected to as incompetent, irrelevant and immaterial.

The Court: It may go in subject to that objection.

OFFER IN EVIDENCE

Tax Commission Form No. 16

Form to be Used in Making the Return of Net Receipts Required by Section 30 of the Act of March 11, 1869, Relating to Fire, Marine and Inland Navigation Insurance, as Amended 1879

Individual Return

Return of net receipts for the year ending April 30, 192-, by the —— agency, located at St. and No., city or village: ——, County, Illinois, for the —— Insurance Co. of Lloyds, of address: ——.

[fol. 23-165] The Return Must Comply with the Following Instructions

An Individual Return must be filled out for every agent issuing or countersigning policies, including any general

agent who issues or countersigns policies of reinsurance or direct insurance, or who has paid taxes in bulk for other agents during the year. A general agent or home officer may fill in the Individual Return as attorney for the local agent, but must not in so doing introduce items of transaction not administered by the local agent and shown on his books, such as reinsurance, overhead and supervisory expense, etc.

Gross receipts are all premiums received for policies issued or countersigned by the agent during the year without deduction on account of the location of the risks. Items of expenses must be actual without the use of computed percentages, except that taxes paid by a general agent for other agents may be pro rated on the receipts of the agents for whom they were paid. When the taxes listed in the Itemized Statement have been paid by an agency other than the one making the Return and the amounts are pro rated the note at the bottom of the return must be filled out with the names of the pro rated taxes and the name and address of the agent who paid them. The total thus pro rated must not exceed the actual payment by such agent. Dues paid to bureaus or associations of underwriters must not be included in Operating Expenses. Return must be made of all business enumerated in the classification of business whatever the title of the foreign company or foreign government Lloyds writing the business.

[fol. 23-166] Deduction for expenses not covered by the itemized statement and for exemption of lines of business covered by the classification of business may be claimed in a Schedule setting forth the facts and detail and attached to the return. Enter the total of the deductions claimed for expenses and exemptions in the space "Total Deductions as per Schedule Attached."

Classification of Business.

1. Fire; including Use and Occupancy, Combined Fire and Sprinkler Leakage, and the Fire portions of combined Fire and Tornado or Hail, or both.

2. Ocean Marine.

3. (a) Motor Vehicles: Fire Policies and Fire portions of Fire and other Coverage.

(b) Motor Vehicles: All coverage other than Fire, excluding Damage to Person.

4. Aircraft.
5. Inland Navigation and Transportation.
6. Tornado, Windstorm and Cyclone.
7. Hail.
8. Sprinkler Leakage.
9. Riot, Civil Commotion and Explosion.
10. All others, viz, ——.

[fol. 23-167]

Itemized Statement

	Gross premiums, dollars	Returned premiums, dollars	Operating expenses											
			Commissions, Dol's	Cts.	Telegrams, postage, etc. Dol's	Cts.	Fire dept., tax, Dol's	Cts.	Fire pat. assessment Dol's	Cts.	Sec. 30 tax Dol's	Cts.	Total operating exp. Dol's	Cts.
1														
2														
3a														
3b														
4														
5														
6														
7														
8														
9														
10														
Totals														

Total Gross Premium less Total Returned Premiums.....

Total Gross Premiums less Total Returned Premiums and Total Op. Exp.....

Total Claimed Deductions as per Schedule Attached.....

Net Receipts for which Liability is Acknowledged.....

Subscribed and sworn to before me this—day of ——, A. D. 192–. —— ——.

NOTE.—The —— Taxes are prorated and were paid by —— ——, Gen. Agt., or Mgr., —— ——.

Section 30 of the Act of March 11, 1869

Relating to Fire, Marine and Inland Navigation Insurance

Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—State, county, town [fol. 23-168] and municipal—that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed; Provided, that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent, in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city.

Penalty.—Section 22 of the Act of March 11, 1869

Any violation of the provisions of this act shall subject the party violating the same to a penalty not exceeding five hundred dollars for each violation, and of the additional sum of one hundred dollars for each month during which any such agent shall neglect to file such affidavits and statements as are herein required.

Penalty.—Section 4 of the Act of June 4, 1879

For the Better Regulation of the Business of Insurance

Any such incorporated company, association or partnership, which shall transact its business in this State in violation of the provisions of this Act, shall together with the agent or agents so unlawfully transacting such business jointly and severally be subject to a penalty of five hundred dollars ($500.00) to be sued for and recovered in the name of the People of the State of Illinois, by the State's

Attorney of the county in which such agent or agents may reside, and one-half of said penalty when recovered shall [fol. 23-169] be paid into the treasury of said county, the other half to the informer of such violations. Provided, however, that any company, whose license may have been revoked as aforesaid shall thereafter be permitted to transact such business as may be absolutely necessary to wind up its business in this State and none other; Provided further, that nothing in this Act contained shall be construed to prevent the filing of an information in the nature of a quo warranto against such corporations so violating the provisions of this Act.

Part of Section 4 of the Act of May 31, 1911

An Act to regulate and control insurance against loss or damage by fire, lightning, hail, windstorm and sprinkler leakage, by partnerships, associations, individuals, or aggregations of individuals, not now authorized to do business in this State, and prescribing the penalty for violation thereof.

Every association, partnership, individual or aggregation of individuals so assuming liability upon property not owned by its members shall so far as the same shall be applicable to the business transacted, be subject to the same requirements, fees and taxes, except as to capital stock and deposits, as are by law imposed upon corporations engaged in the same or similar business in this State, for purposes of taxation, gross receipts or premiums shall be construed to be the cost of insurance to the insured, excluding portions of premiums returned to policy holders. Provided, however, that nothing herein shall apply to any business done in accordance with the surplus line law of this State: And provided, further, that mutual [fol. 23-170] insurance companies incorporated under the laws of other States shall be entitled to do business in this State subject to the provisions of this Act.

Title of Sprinkler Leakage Insurance Act

An Act authorizing fire insurance companies to insure sprinklers, pumps or other fire apparatus and also to insure against loss or damage by the same. (1905)

Automobile Clause of Act of March 11, 1869. (Sec. 1a (1912))

That all insurance companies authorized to transact business of fire, marine or inland navigation insurance in this State may, in addition to the business which they are now authorized by law to do, insure automobiles or other motor vehicles, whether stationary or being operated under their own power, against all or any of the risks of fire, lightning, windstorm, tornadoes, cyclones, explosions, hail storms, transportation by land or by water, theft and collision, upon filing with the Insurance Department of the State of Illinois official notification of their purpose so to do: Provided, the same shall be clearly expressed in the policies.

Section 1, Clause 7, of the Casualty Act. (1899)

Seventh.—Against any other casualty or insurance risk specified in the article of incorporation, which may lawfully be the subject of insurance and the formation of corporation for insuring against which is not otherwise provided for by these Statutes.

[fol. 23-171] The net receipts from insurance against the hazards of fire, marine and inland navigation and transportation; automobile hazards except damage to persons; and sprinkler leakage hazards; must be returned for taxation by all agents, issuing or countersigning policies for any foreign company or foreign government Lloyds, whether such company or Lloyds is termed fire, marine, automobile or casualty.

Tax Commission Form No. 16

Insurance Companies Return of Net Receipts

See Section 30 of the Act of March 11, 1869

For the Year ——.
Agency: ——.
Address: ——.
Name of Company or Lloyds: ——.
Address: ——.

[fol. 23-172] PEOPLE'S EXHIBIT 2

12/17/31

6181

Edward R. Litsinger, Chairman; William H. Weber, Charles V. Barrett

Meyer Cossman, Chief Clerk

Telephone: Franklin 3000

Seal of the County of Cook, Illinois. March, 1831, Firemen's Ins. Co. Received, E. P., Nov. 11, 1927. Western Department, Chicago, Ill. Indus. Insurance Co. of N. Y. Pa.—Phila.—1920.

Board of Review of Cook County, Room 337, Third Floor, County Building, Chicago, Ill.

November 8, 19—.

To Mechanic's Ins. Co. of Philadelphia, Pa., Herbert A. Clark, Mgr., 844 Rush Street, Chicago, Ill.

[fol. 23-173] Notice for Years Ending April 30, 1870, to 1898, Inclusive

You are hereby notified that at 10 o'clock a. m., Thursday, Dec. 15, 1927, in the hearing room of the Board of Review of Cook County, Illinois, on the third floor of the County Building, in Chicago, Illinois, there will be a hearing upon a proposed listing and assessment of net receipts of your agencies in Cook County, Illinois, required to be listed and subject to taxation under Section 30 of the Act entitled, "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved March 11, 1869, and the acts of the General Assembly amendatory thereof and supplementary thereto, and which were not legally listed, but were omitted from listing and assessment for each of the periods of one year ending April 30 of the years 1870 to 1898, both inclusive, and upon which no taxes have been paid, at which time you are required to attend and will be entitled to be heard.

You are further notified that you are hereby required to file with the clerk of said Board of Review in his office on the third floor of the County Building, in Chicago, Illinois, on or before November 22, 1927, separate returns in writing for each one of your agencies maintained in Cook County, Illinois, during each period of one year ending April 30 of the years 1870 to 1898, both inclusive, verified by the oath of some one or more of your officers or agents, setting forth in a separate return or returns for each of said one year periods the net receipts of all of the business [fol. 23-174] done for you by each such agency for such year and in the following detail:

Classification of Business

If your annual report for the year to the Insurance Department of the State of Illinois gives only "Fire" or "Marine and Inland" as the kind of business done in the State of Illinois during the year, all of the business of the agency must be summed up under such heading. If the business done and there reported comprises "Fire," "Marine and Inland," "Tornado," etc., separate the business of the agency into the amounts of each of such kinds of business that may have been done. State for each kind of business in a tabulation the following:

(a) Gross premiums received.

(b) Returned premiums on cancellations.

(c) Gross premiums less Returned Premiums, (a) less (b).

(d) Commissions paid.

(e) Telegrams, Postage and other incidentals paid.

(f) The allocated part of any payment of Fire Department Tax.

(g) The allocated part of any payment of Sec. 30 tax.

(h) The allocated part of any payment of Fire Patrol Assessment.

(i) The allocated part of any payment of expenses of Chicago Board of Underwriters.

(j) The allocated part of any payment of expenses of Chicago Underwriters Assn.

[fol. 23-175] (k) The allocated part of any payment of expenses and salaries of employees engaged exclusively in supervising business in Cook County.

(l) The allocated part of any payment of all other kinds of expenses.

(m) The total of an itemized showing of the deduction claimed on account of each kind of business included in the above for which exemption is claimed.

(n) The amount of the net receipts of such agency.

Items (f), (g), (h), (i), (j) will not be considered unless accompanied by a return made by some one of your officers, or agents, which shall show for each of said items the exact amount of the total payment, the total amount of business upon which the rate of allocation is based, itemized each kind, and the rate of allocation.

In like manner such report must show the itemized expenses, the itemized amounts of business upon which the allocation is based and the rate of allocation for items (k), (l).

Companies that are mergers or combinations of other companies, must file returns for the agents of such other individual companies for the years prior to the merger or combination.

Notice for Years Ending April 30, 1899, to 1922, Inclusive

You are hereby further notified that at 10 o'clock a. m., Thursday, Dec. 15, 1927, in the hearing room of the Board of Review of Cook County, Illinois, on the third floor of the County Building, in Chicago, Illinois, there will be a [fol. 23-176] hearing upon a proposed listing and assessment of net receipts of your agencies in Cook County, Illinois, required to be listed and subject to taxation under Section 30 of the Act entitled, "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved March 11, 1869, and the acts of the General Assembly amendatory thereof and supplementary thereto, and which were not legally listed, but were omitted from listing and assessment for each of the periods of one year ending April 30 of the years 1899-1922, both inclusive, and upon which no taxes have been paid, at which time you are required to attend and will be entitled to be heard.

You are hereby further notified that you are hereby required to file with the clerk of said Board of Review in his office, on the third floor of the County Building, in

Chicago, Illinois, on or before November 22, 1927, separate returns in writing for each one of your agencies maintained in Cook County, Illinois, during each period of one year ending April 30 of the years 1899 to 1922, both inclusive, verified by the oath of some one or more of your officers or agents, setting forth in a separate return or returns for each of said one year periods the net receipts of all of the business done for you by each such agency for such year the same details and items of information above required with respect to the returns for each of the one year periods ending April 30 of the years 1870 to 1899, both inclusive.

[fol. 23-177] Notice for Years Ending April 30, 1923, to 1926, Inclusive

You are hereby further notified that at 10 o'clock a. m., Thursday, Dec. 15, 1927, in the hearing room of the Board of Review of Cook County, Illinois, on the third floor of the County Building, in Chicago, Illinois, there will be a hearing upon a proposed listing and assessment of net receipts of your agencies in Cook County, Illinois, required to be listed and subject to taxation under Section 30 of the Act entitled, "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved March 11, 1869, and the acts of the General Assembly amendatory thereof and supplementary thereto for each of the periods of one year ending April 30 of the years 1923 to 1926, both inclusive, upon which no taxes have been paid, and the listing and assessment of which heretofore attempted to be made for each of said years was illegally made, at which time you are required to attend and will be entitled to be heard.

You are hereby further notified that you are hereby required to file with the clerk of said Board of Review in his office on the third floor of the County Building in Chicago, Illinois, on or before November 22, 1927, separate returns in writing for each one of your agencies maintained in Cook County, Illinois, during each period of one year ending April 30 of the years 1923 to 1926, both inclusive, verified by the oath or oaths of some one or more of your officers or agents, setting forth the net receipts of all business done for you by such agency for such year, which returns shall [fol. 23-178] be in strict compliance with the form known

as "Tax Commission Form No. 16" and the instructions contained therein, a copy of which form is hereunto attached.

Notice for Year Ending April 30, 1927

You are hereby notified that at 10 o'clock a. m., Thursday, Dec. 15, 1927, in the hearing room of the Board of Review of Cook County, Illinois, on the third floor of the County Building, in Chicago, Illinois, said Board of Review will review the listing and assessment made by the Board of Assessors of said county of the net receipts of your agencies in said county required to be listed and subject to taxation for the year ending April 30, 1927, under Section 30 of the Act entitled "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved March 11, 1869, and the acts of the General Assembly amendatory thereof and supplementary thereto.

You are hereby further notified that you are hereby required to file with the clerk of said Board of Review in his office on the third floor of the County Building in Chicago, Illinois, on or before November 22, 1927, separate returns in writing for each one of your agencies maintained in Cook County, Illinois, during the one year ending April 30, 1927, verified by the oath or oaths of some one or more of your officers or agents, setting forth the net receipts of all business done for you by such agency for such year, which return shall be in strict compliance with the form known as "Tax Commission Form No. 16" and the instruc-[fol. 23-179] tions contained therein, a copy of which form is hereunto attached.

Dated Chicago, November 8, 1927.

The Board of Review of Cook County, Illinois, by Meyer Cossman, Chief Clerk.

(Attached to the notice is a copy of Form 16.)

It was here admitted by the defendant that it appeared before the Board of Review by its attorneys on December 15, 16 and 28, 1927.

The plaintiff offered in evidence a letter written by Frederick D. Silber, one of the attorneys for the defendant,

to the Board of Review on September 21, 1931, containing among other things the following:

"The companies have, however, steadfastly refused to recognize the validity of Form 16 and they will continue to do so."

Said offer was denied by the court, and exception.

Mr. Silber then made the following statement:

"I am perfectly willing to say that the companies have always taken the position that Form 16 was essentially an invalid form because it did not give them the benefits of deductions that the law should and did give them and for other reasons, and therefore they refused to comply with it."

[fol. 23-180] JAMES A. LAUER, called for defendant, testified as follows:

Direct examination:

I reside in Chicago where I have lived practically all my life. Up to 1925 I was first assistant to Stephan Griffin, chief clerk of the Board of Review. After that I was first assistant to Meyer Cossman, the succeeding chief clerk. I had supervision of all the group hearings, like the banks and the fire insurance companies, and before then the brewers and the malsters and all those that were summoned as a class, as a group. I had general supervision over the assessment of net receipts of the foreign fire stock insurance companies during the years 1923 to 1928, inclusive. During that period there were assessments annually and extensions of net receipts on the books of the Board of Review. While I was there acting in the capacity of assistant, Charles V. Barrett, a member of the Board of Review dealt with me in regard to these net receipts taxes. I remember that during the year 1928 these assessments of omitted net receipts from 1923 to 1927 were spread upon the books and Charles V. Barrett, a member of the Board caused them to be spread upon the books. I don't think I had any talk with any other member of the Board. The sources from which I got the figures that I spread upon the books

in 1928 for these so-called omitted net receipts were the returns that were filed by the insurance companies. Mr. Seeley arranged the figures. Mr. Seeley furnished them to me. From his figures I transferred to the books of the Board. That was done under my immediate direction. I [fol. 23-181] checked these figures without any other source of calculations. During that period Mr. Seeley had space in the personal property department. He worked there and his stenographer worked there. He was there almost daily.

Mr. Barrett told me to put these figures on the books. Seeley furnished me the figures. Outside of that I was aware of no other consideration of the amount of these assessments by the Board as a board. As far as I know the Board did not consider it as a board excepting in the respect that I have stated.

There was a record kept of the proceedings of the Board during the period in question. We kept a calendar that showed the day and the hour when these matters were placed for hearing. It just noted the things that were coming up for hearing. Where there was anything to keep we kept minutes. I watched that they were drawn and the stenographer did the actual reporting. You served me with a subpœna to produce such minutes for that period. I could not answer whether they are now in existence because I don't know. I understand that some of the records have been destroyed.

Cross-examination:

What I did in spreading these assessments I did by direction of Mr. Barrett.

The defendant introduced in evidence a contract entered into January 10, 1928, between Ralph R. Bradley and the City of Chicago, acting through Samuel A. Ettelson, its corporation counsel, which contract provided for the rendering of services by Bradley in and about the collection of [fol. 23-182] taxes on the omitted net receipts of fire insurance companies and the payment to him out of the moneys collected of 33⅓ per cent of the amounts collected for the corporate fund of the City of Chicago for years prior to 1923 and of 15 per cent of the amount collected for subsequent years.

The defendant introduced in evidence contract of September 27, 1926, between the County of Cook and Bulkley, Moore & Tallmadge, by which that firm was to receive 15 per cent of the money received for net receipts taxes from foreign fire insurance companies and 33⅓ per cent of all received from alien fire insurance companies or the alien property custodian.

AGREEMENT AS TO PENDING SUITS

It was here agreed that in 1928 the People of the State of Illinois filed suits against the insurance companies upon omitted net receipts running back from the year 1869, up to 1922, and that those suits so far as they are against the 17 companies in question are still pending and undetermined. When the settlements were made with the other companies the declarations were all amended so as to include all these taxes that were put on the books. The companies now in question refused to do anything about it and so those suits against them are still pending. The plaintiffs are ready to amend and put them all in so that the result of this lawsuit will be to wipe them all off.

[fol. 23-183] HERMAN B. SEELEY, called for defendant, testified as follows:

Direct examination:

The State Tax Commission in 1924 addressed a circular letter to the assessors, of which the one shown here is a correct copy. I got that letter from the State Tax Commission. It might have been issued in 1924. It refers to the decision of 1923.

Mr. Silber: I object to the offer of this letter in evidence, not on the ground that it is not a true copy, but on the ground that it is hearsay, that it is not binding upon these insurance Companies; that notice addressed by the State Tax Commission to tax bodies in the state is something entirely beyond the record in this case.

The Witness: I don't know whether these letters were received by the Board of Assessors and the Board of Re-

view in Cook County at the time they were issued. They were sent to all assessors. The matter was not sent to the Board of Review but was sent to the assessors. I got this copy from the Tax Commission. They had mailed that to the assessors.

Mr. Silber: Well, understand, I am not basing my objection upon any such technical ground.

The Court: I understand that.

Mr. Gilbert: The State Tax Commission, as pointed out the other day, is the body that tells these assessors on the Board of Review what they shall do. They got this Form 16 form of report and then they proceed to prescribe some book to enter these assessments in, which accounts for the [fol. 23-184] fact that in 1927 the Board of Review entered these net receipts in a separate book, and I think it is competent to show what the Tax Commission held with respect to these things.

The court held the letter could go in for what it was worth.

Mr. Gilbert: It may not be worth very much but of course there is a whole lot of truck in here.

OFFER IN EVIDENCE

Circular letter by the State Tax Commission to assessors. This letter called attention to the decision of the Supreme Court in People vs. Barrett, 309 Ill. 53, and stated that it was binding upon all assessors and Board of Review in the state and that the Board of Review was required to observe the following instructions in appraising such net receipts for the year ending April 30, 1924:

1. Serve each agent doing a business of fire insurance and inland navigation insurance with copies of Tax Commission Form 16, 1924 edition enclosed herewith, one for each foreign insurance company or foreign government Lloyds for which he has done any business of the kinds classified in the form during the year ending April 30, 1924. The business of companies in this state or of Lloyds of another state must not be returned on Form 16 or entered on the tax lists as net receipts. Instruct agents doing

business for an underwriter's agency to make return of such business in the name of each company assuming the risk; for example, business done for the Philadelphia underwriters should be returned one-half for the fire association by Phil. Und. and one-half for the insurance company of North America by Phil. Und. The business for the New [fol. 23-185] York underwriters should be returned for the Hartford Fire Insurance Co. by N. Y. Und.

2. Make entries of net receipts on assessors' warrants having titles and headings like the enclosed sheet. Such warrants should be bound in books separately from other assessments. Entries under the separate headings are to be copied from similar items in Form 16 without alteration. Enter as net receipts the total beneath the itemized statement in the form which is termed "total gross premiums less total return premiums and total Op. Exp." Returns upon Form 16 must be in strict agreement with the instructions in the form and returns upon other forms must be rejected and demand made for a correct return upon Form 16. In the absence of a return upon Form 16 make no entries of estimated amount and note the refusal of a return in the margin added "remarks." Deliver all returns on Form 16 to the Board of Review with the book containing the entries of net receipts.

3. Report all cases of refusal and make due return upon Form 16 to the State's Attorney of the county with the request that they begin immediately suits for the penalties listed on the back of Form 16.

Refusal to make the return of net receipts upon Form 16 as provided therein is a failure "to comply with the requirements now imposed on existing law" and is subject to the penalty of $500 provided in Section 4 of the Act of June 4, 1879, for the better recognition of the insurance business and also to the penalty of $100 per month for each month in which the agent shall fail to make the return (Section 2 of the Act of March 11, 1869, governing fire, [fol. 23-186] marine and inland navigation insurance business). Within two weeks after notification of the State's Attorney of the cases of refusal to make return advise this Commission of the status of the proceedings.

HERMAN B. SEELEY further testified as follows:

The slips shown me are the slips which Mr. Silber asked me to produce and which were used by me in computing the assessments. The gross receipts shown on the returns made by the National Insurance Company were taken as a basis and they were allowed a 30 per cent deduction for expenses on the ground of business, which is done by the Class 1 accounts. Then the accounts that were outlying were allowed 25 per cent deduction because their expenses were less and where they showed rturns for outside towns those were not assessed at all, they were deducted out, left out.

The 30 per cent deduction for expenses had been determined by the Board in 1924 as a maximum amount. The construction adopted by the Board of the decision in the Barrett case there was——

Mr. Silber: Now, I object, if the court please, to a statement by the witness of what some public body, acting in an official capacity, concluded, because there is only one way to prove that and that is by the records of that body. If the Board of Review made a finding to that effect their minutes or some official entry would have to be used to prove it. You cannot have anybody come in here and testify to that sort of thing.

The court sustained the objection and the plaintiffs excepted.

[fol. 23-187] W. H. ROADIFER, recalled for further cross-examination, testified as follows:

Cross-examination:

In my testimony in reference to the returns made to the Board of Review in these various years, I testified that they were taken from the books and were correct showings of gross receipts and expenses. In our business we keep what we call an agents' register. Against that the agent renders an account which is checked against that and the net results of his monthly account is placed on what we call a premium record, on the insurance company's books. That is at our department office here in Chicago.

In Cook County the arrangement with the agent is not a signed contract. When we appoint an agent in Cook County we allow the Board commission which is established by the Chicago Fire Underwriters. This agent collects the insurance premiums. He makes a report to the company once a month. He puts in his report the premiums, listing them by policies. He puts in the return premiums that he has paid back under our policies, listing those by the policy number. He subtracts the return premiums from his premiums, making the net premiums. Then he computes them, the commission to which he is entitled on the net premiums and charges any other expenses that might be allowable on his account, such as the postage, and arrives at the balance due the company for the month, and he remits the amount to the company.

[fol. 23-188] The returns I speak of were made up from other sources than the books of the agent. It is the practice of our company to forward these accounts for storage purposes to our home offices in Hartford. In arriving at the matter of net receipts in reports to the Board of Assessors we would not simply report the above premiums less the return premiums or the deductions which the agent had made. We had rents, lights besides, salaries, travel expenses, all other expenses, that is, a portion of all the expenses necessary in operating an insurance company.

Herman B. Seeley, recalled for plaintiffs, testified as follows:

Redirect examination:

These slips consist of computations made from each return. The National Fire had a number of agencies scattered about through the City of Chicago.

Mr. Roadifer made the return for all the agents. He made them separately for each agent. I took the gross receipts as reported in each of these returns and I applied the 25 per cent equalization. I applied the 25 per cent equalization because of my understanding the Board had fixed that. What I did then was to compute the expenses of 30 per cent. Here is what was done. Mr. Roadifer made a return for each agent and I marked on it if it was in the

South Town District and in the Loop. As I marked it I marked it as S1, meaning that it was to have the 30 per cent deduction. The outlying agents in the South Town would be all added together and allowed 25 per cent deduction for expenses, also we separated them from the different [fol. 23-189] park districts throughout the city. The court had held in the Barrett case that the different agencies should be assessed to their location, and as the Board of Review could not at that time make any assessments for outlying towns, those were omitted to be put in at some subsequent assessment, so that the assessments represent simply the assessments for the City of Chicago; and not for any outside town. All other items were excluded. I had a young girl who was a stenographer and had been sent over to assist me by the law department of the School Board and she tabulated those and the amounts that were arrived at by adding up and taking off the 70 per cent, were then turned over to a clerk to put them on the books. In other words, I made the computations. I deducted 30 per cent, whatever the commission was, from the gross receipts and those were turned over to the clerk and they were entered in that way. In nearly every other instance of other complaints where the agencies were in the South Town and the Class 1 agents, and in those cases, the deduction was always 30 per cent for expenses.

Cross-examination:

In fact, that 30 per cent I am referring to at this minute in this five years' time alleged omitted net receipts assessment in order to get at them.

I did not bring about the decision of the Barrett case to the extent of having these assessments extended at 100 per cent instead of the way they had been for 50 years. That was an error of the court. The court made the error. We did not. It was an error brought about by the work that you had done.

[fol. 23-190] I did work upon the basis of which the case of People vs. Kent and People vs. Barrett were finally decided. I will not accept the statement that the result of the opinion of the court in People vs. Barrett was brought about by these activities of mine at that time.

In our petition before the Supreme Court we alleged that the companies had been deducting an overhead which

should not be allowed, but that they had not put in their automobile business which they classed at that time as a marine business; they had not put in the marine business or the inland navigation business on the theory that the risks were not in Cook County, were not Cook County risks but were outside, and you will find the decision particularly emphasizes that point in deciding. We insisted that the full amounts of the net receipts should be listed in the full value column. Now if they had done that there would have been no trouble. We never sought to have the division by five set aside. It was the court that made that mistake. It was not in our case at all, neither in the Kent case. I should say everybody was surprised. I had nothing to do with the 300 suits that were filed. I did not cause 300 suits to be filed against these foreign stock insurance companies. But as the court had insisted on it I prepared the evidence for that. Subsequently, these back tax suits were wiped out by the subsequent decision of the Supreme Court in the Hanover case in the 327th Illinois. But the first, the one for the first 30 years was revised by the Board of Review at the same time when this other revision was made. The fact is in 1924 the Board made two assessments.

[fol. 23-191] COLLOQUY

Here the following colloquy occurred:

Mr. Seely: And in 1925 and 1926 there was only one assessment made by the assessors and the Board of Review similar to that one made in 1925.

Mr. Gilbert: In other words, in 1924, as I understand it now, the Board of Assessors made their assessment and the Board of Review, all they did was to double it?

Mr. Silber: Yes.

Mr. Gilbert: And then they also made this other assessment in which they took this 30 per cent business? That was in 1924?

Mr. Silber: That was in 1924.

Mr. Gilbert: In 1925 and 1926 the Board of Review only made one assessment?

Mr. Silber: Let me add to that. In 1925 and 1926 the evidence shows both by Mr. Barrett's testimony and by

other testimony that in addition to this form of assessment, the Board of Review made an assessment upon the so-called credits, personal property listed as credits, which were the same net receipts we had returned.

Mr. Seeley: Not in 1925 and 1926, but he did in 1927.

Mr. Silber: In other words, if I am getting you correctly now, in 1925 and 1926, there was the Board of Assessors' assessment at 50 per cent according to law.

Mr. Seeley: Oh, no.

Mr. Silber: Our returns were reduced to 50 per cent. That is what the Board of Assessors did in every year, each year. If that is not conceded I won't concede anything be- [fol. 23-192] cause that is the basis of it.

Mr. Gilbert: That is right.

Mr. Silber: The Board of Assessors took our returns and put in the assessed valuation column at 50 per cent. The Board of Review took the records of the Board of Assessors and took our gross receipts less 30 per cent expenses and called them net receipts for those two years. In 1927 they assess-d the same net receipts under the column marked credits or personal property and also the alleged omitted net receipts for said year and in addition on this form they assessed us in 1928 on the net receipts. That is correct, isn't it?

Mr. Gilbert: That is correct.

Mr. Silber: So the stipulation will show those facts?

Mr. Gilbert: Yes, will show those facts.

Mr. Silber: And show the fact that those 30 per cent deductions were without our knowledge and without any hearings so far as we are concerned we did not know about them until now when it was brought to our attention. To that extent I am willing to waive all questions of error in the admission of this kind of testimony as to its not being the best form of testimony and agreeing with Judge Gilbert in trying to write up the record in this form.

[fol. 23-193] Herman B. Seeley, recalled, testified as follows:

Cross-examination:

In this transcript that was read from in the hearing the other day there was something said about the companies

having made returns before the Board of Review in this hearing in December, 1927, that were at least equivalent to 75 and perhaps 80% of the amount that would have been shown if the returns had been made on Form 16. That was for one company. I assumed when I made up my statement for each company of so-called omitted net receipts in 1928, the gross receipts would amount to at least 75 per cent of the amount that would be shown as a whole if those returns had been made on Form 16.

The statement before the Board of Review was if they had made their sworn returns on Form 16 they would have shown not more than 25 per cent greater than the return they made but that was on all the companies. In 1928 when I say we debased them, what I have in mind is I gave them an equivalent of a debasement because of that 25 per cent difference. We did not debase any company's return by anything excepting this imaginary 25 per cent. We took 30 per cent or 25 per cent, as the case may be, in Class 1 agencies, or outlying agencies as allowance for expenses and carried the remainder forward as net receipts, and that is the way all the so-called alleged omitted property assessments were made in 1928, excepting with very few unimportant exceptions.

STIPULATION

Stipulation that each defendant in each of the cases had been admitted to do business in Illinois for many years [fol. 23-194] prior to 1923 and each of the defendants on May 1, 1923, and continuously thereafter had, and now has, within the State of Illinois intangible property consisting of agents and the good will of the business, of substantial value and in each case of a value in excess of $5,000, and that such respective agency plants had been built up by each of said defendants at large cost and expense over a long period of time, but no assessments thereof against the defendants were ever made or any taxes thereon paid.

The foregoing was all of the evidence heard or received by the court upon the trial of said cause.

FINDINGS

Thereupon, the defendant tendered to the court and the court made and held the following findings to each of which the plaintiffs then and there excepted:

Finding No. 1. The court finds that the respective assessments of so-called omitted net receipts of the defendant company for the years 1923, 1924, 1925, 1926 and 1927, sued for in this suit, were fraudulently made and that the taxes extended thereon are void.

Finding No. 2. The court finds that the so-called omitted net receipts assessments made against the net receipts of the defendant company, for the years 1923, 1924, 1925 and 1926, were made upon a basis of valuation substantially greater for full fair cash market value than the 60 per cent valuation adopted by the Board of Assessors and the Board of Review of Cook County, for other property assessed in each of said years, respectively, and that the statutory 50 per cent reduction was not applied to such full value in order to determine the assessed value of such net receipts for each of said years, and that thereby the taxes so ex- [fol. 23-195] tended lacked uniformity with taxes extended against other property of the same full fair cash market value, and thereby such taxes so extended were void.

Finding No. 3. The court finds that the net receipts assessment made against the net receipts of defendant company, for the year 1927, was made upon a basis of valuation substantially greater than the 60 per cent basis of valuation adopted by the Board of Assessors and the Board of Review of Cook County, for other property assessed in said year 1927, and thereby the tax extended upon the assessment so made lacked uniformity and was void.

Finding No. 4. The court finds that the defendant company was not given any opportunity to be heard in December, 1927, or thereafter, upon the assessments of so-called omitted net receipts proposed to be made for the years 1923, 1924, 1925 and 1926, respectively, and that the assessments made in 1928 upon so-called omitted net receipts for the years in question were made without further notice to the defendant company, and without further op-

portunity given for said company to be heard, and that the taxes extended upon such assessments were and are void.

Finding No. 5. The court finds that assessments upon net receipts for the years 1923, 1924, 1925, 1926 and 1927, were made by the Board of Review of Cook County in 1928, and that prior assessments upon the identical net receipts so assessed for each of said years in 1928 had been made by the Board of Assessors and Board of Review of Cook County, in each of said respective tax years; that taxes had been extended upon such prior assessments against the defendant company, and that liability for the payment of such prior taxes so extended remained of record against the defendant company; that the net receipts so assessed in each of said respective tax years were the same and [fol. 23-196] identical net receipts as were again assessed for each of said years in 1928 by the Board of Review of Cook County; that the assessments so made in 1928 for said respective tax years were null and void and the taxes extended thereon were likewise null and void.

Finding No. 6. The court finds that the assessment of omitted net receipts for the years 1923, 1924, 1925 and 1926, and of net receipts for the year 1927, made by the Board of Review, all in 1928, was made without the exercise of honest judgment by the Board of Review and at the mere will of said Board.

Finding No. 7. The court finds that in 1928 Herman B. Seeley was a beneficiary under contracts with the City of Chicago, the County of Cook, and other taxing bodies, whereby it was agreed that he was to derive a contingent compensation from the collection of taxes assessed against net receipts of the defendant and other foreign stock fire insurance companies in Illinois; that said Seeley thereby had a contingent fee interest in the collection of the identical taxes upon net receipts of the defendant and other foreign stock fire insurance companies that were assessed by the Board of Review and are now being sued for in this suit. The court finds that the valuations of so-called omitted net receipts adopted by the Board of Review of Cook County, in 1928, for the five tax years in question, were prepared by said Seeley and were listed as valuations of net receipts upon the books of said Board of Review of

Cook County, without consideration by the Board, and assessed at the going tax rates applicable, and that the taxes so extended upon the assessments so made were fraudulent and null and void.

The court in rendering its decision hereinafter stated in favor of the defendant based it solely upon the foregoing findings.

[fols. 23-197-397] Thereupon, the court found the issues in favor of the defendant, and that the defendant was not indebted to the plaintiffs on acount of the taxes set forth in the declaration, as therein alleged, to which finding the plaintiffs then and there excepted.

MOTION FOR NEW TRIAL

Thereupon, the plaintiffs moved the court to set aside said finding and grant the plaintiffs a new trial in said cause; which motion the court overruled, and to which ruling the plaintiffs then and there excepted.

JUDGMENT

Thereupon, the court entered judgment in favor of the defendant upon said finding, and that the plaintiffs should take nothing by their suit, to the entry of which judgment the plaintiffs then and there excepted.

[fol. 398] IN SUPREME COURT OF ILLINOIS, JUNE TERM, A. D. 1932

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiffs and Appellants,

vs.

THE CONCORDIA FIRE INSURANCE COMPANY, Defendant and Appellee.

Appeal from Circuit Court of Cook County

Hon. H. Sterling Pomeroy, Judge Presiding

ASSIGNMENT OF ERRORS

And now come the plaintiffs and appellants by their attorney and say that in the record and proceedings of this

court below in the above entitled cause manifest errors have intervened to the prejudice of plaintiffs and appellants as follows:

First. The court below erred in finding that the respective assessments of so-called omitted net receipts of the defendant company for the year 1923, 1924, 1925, 1926 and 1927, sued for in this suit were fraudulently made and that the taxes extended therein are void.

Second. The court below erred in finding that the so-called omitted net receipts assessments made against the net receipts of the defendant company, for the years 1923, 1924, 1925 and 1926, were made upon a basis of valuation substantially greater for full fair cash market value than the sixty per cent valuation adopted by the Board of Assessors and the Board of Review of Cook County, for other property assessed in each of said years, respectively, and that the statutory fifty per cent reduction was not applied to such full value in order to determine the assessed value of such net receipts for each of said years, and that thereby the taxes so extended lacked uniformity with taxes extended against other property of the same full fair cash market value, and thereby such taxes so extended were void.

[fol. 399] Third. The court below erred in finding that the net receipts assessment made against the net receipts of defendant company, for the year 1927, was made upon a basis of valuation substantially greater than the sixty per cent basis of valuation adopted by the Board of Assessors and the Board of Review of Cook County, for other property assessed in said year 1927, and thereby the tax extended upon the assessment so made lacked uniformity and was void.

Fourth. The court below erred in finding that the defendant company was not given any opportunity to be heard in December, 1927, or thereafter, upon the assessments of so-called omitted net receipts proposed to be made for the years 1923, 1924, 1925 and 1926, respectively, and that the assessments made in 1928 upon so-called omitted net receipts for the years in question were made without further notice to the defendant company, and without further opportunity given for said company to be heard, and that

the taxes extended upon such assessments were and are void.

Fifth. The court below erred in finding that assessments upon net receipts for the years 1923, 1924, 1925, 1926, and 1927, were made by the Board of Review of Cook County in 1928, and that prior assessments upon the identical net receipts so assessed for each of said years in 1928 had been made by the Board of Assessors and Board of Review of Cook County, in each of said respective tax years; that taxes had been extended upon such prior assessments against the defendant company, and that liability for the payment of such prior taxes so extended remained of record against the defendant company; that the net receipts so assessed in each of said respective tax years were the same and identical net receipts as were again assessed for each of said years in 1928 by the Board of Review of Cook County; that the assessments so made in 1928 for said respective tax years were null and void and the taxes ex-[fol. 400] tended thereon were likewise null and void.

Sixth. The court below erred in finding that the assessment of omitted net receipts for the years 1923, 1924, 1925, and 1926, and of net receipts for the year 1927, made by the Board of Review, all in 1928, was made without the exercise of honest judgment by the Board of Review and at the mere will of said Board.

Seventh. The court below erred in finding that in 1928 Herman B. Seeley was a beneficiary under contracts with the City of Chicago, the County of Cook, and other taxing bodies, whereby it was agreed that he was to derive a contingent compensation from the collection of taxes assessed against net receipts of the defendant and other foreign stock fire insurance companies in Illinois; that said Seeley thereby had a contingent fee interest in the collection of the identical taxes upon net receipts of the defendant and other foreign stock fire insurance companies that were assessed by the Board of Review and are now being sued for in this suit. The court below erred in finding that the valuations of so-called omitted net receipts adopted by the Board of Review of Cook County, in 1928, for the five tax years in question, were prepared by said Seeley and were listed as valuations of net receipts upon the books of said Board of Review of Cook County, without consideration by

the Board, and assessed at the going tax rates applicable, and that the taxes so extended upon the assessments so made were fraudulent and null and void.

Eighth. The court below erred in finding the issues in said cause in favor of the defendant.

Ninth. The court below erred in not finding the issues in said cause in favor of the plaintiffs.

[fol. 401] Tenth. The court below erred in finding that the defendant was not indebted to the plaintiffs on account of the taxes set forth in the amended declaration as therein alleged.

Eleventh. The court below erred in not finding that the defendant was indebted to the plaintiffs on account of the taxes set forth in the amended declaration.

Twelfth. The court below erred in not sustaining the motion of the plaintiffs to set aside its finding for the defendant and in not granting the plaintiffs a new trial in said cause.

Thirteenth. The court below erred in entering judgment in said cause in favor of the defendant.

Fourteenth. The court below erred in not entering judgment in said cause in favor of the plaintiffs.

Fifteenth. The court below erred in not entering judgment in said cause in favor of the plaintiffs for the amount of the taxes claimed in the plaintiffs' declaration with interest thereon at one per cent per month from Jan. 1, 1932.

Sixteenth. The court below erred in admitting incompetent evidence on behalf of the defendant.

Seventeenth. The court below erred in rejecting competent evidence offered by the plaintiffs.

Eighteenth. The court below erred in entering judgment in manner and form in which the same was entered.

Whereupon, for these and other errors manifest in the record, the plaintiffs pray that the judgment of the court below may be reversed and a judgment entered in this court in favor of the plaintiffs and against the defendant

[fols. 402-404] for the amount of the taxes claimed in the plaintiffs' declaration with interest thereon according to law, or that such other order or judgment may be entered by the court as may be in accordance with the law and the evidence.

John A. Swanson, State's Attorney; Leon Hornstein, Louis H. Geiman, Harris F. Williams, Hiram T. Gilbert, Plaintiffs' Attorneys.

[fol. 405] In Supreme Court of Illinois

Docket No. 21441—Agenda 39—June, 1932

The People of the State of Illinois, Appellant,

v.

The Concordia Fire Insurance Company of Milwaukee, Wisconsin, Appellee

Opinion—Filed Oct. 22, 1932

Mr. Chief Justice Heard delivered the opinion of the court:

The State's attorney of Cook county, by the direction of the board of county commissioners of that county, brought a suit in the circuit court in the name of the People of the State of Illinois, under section 230 of the Revenue act, against appellee, the Concordia Fire Insurance Company of Milwaukee, Wisconsin, for omitted and unpaid taxes on the net receipts of its business in Cook county for the years 1923 to 1927, inclusive. The cause was heard by the court without a jury, and the issues which had been made were found in favor of the defendant and judgment was entered on the finding. From the judgment the plaintiff has appealed to this court.

This is a companion case of People v. Franklin Nat. Ins. Co. 343 Ill. 336, the main difference being that in that case the defendant stood by its demurrer to plaintiff's declaration, while in the present case an issue of fact was made and the judgment was based on evidence heard by the court. In each case one of the main contentions of appellee was

that section 30 of the act of 1869, (Cahill's Stat. 1929, chap. 73, sec. 159,) the section by virtue of which the assessment in each case was made, was unconstitutional and void within the purview of the constitutions of the United States and of this State. An extensive brief has been filed by appellee upon this subject, but a careful and exhaustive examination of it discloses the fact that no new point is raised therein which was not raised by the same counsel and considered and discussed by this court in opinions filed in People v. Franklin Nat. Ins. Co. supra, and Hanover Fire Ins. Co. v. Harding, 327 Ill. 590, in each of which cases section 30 was held to be valid and especially found not to contravene the fourteenth amendment of the United States constitution. For a more complete discussion of the questions raised, reference is made to the opinions in those cases. The latest discussion as to the meaning and applicability of the fourteenth amendment by the Supreme Court of the United States is to be found in an opinion handed down May 23, 1932, in Sproles v. Binford, 76 U. S. [fol. 406] (L. ed.) 827, and by this court in People v. Monroe, 349 Ill. 000, reference to which opinions is likewise made.

The evidence shows that for the years 1923 to 1926, inclusive, appellee made in each year what it claims was a proper return of its net receipts to the board of assessors of Cook county. Such returns were accepted by the taxing bodies and taxes extended thereon in each year, and in each year the taxes were returned by the county collector as unpaid. These assessments were not scaled and debased, the same as other personal property assessments, in accordance with the rule laid down in Hanover Fire Ins. Co. v. Harding, supra. A like return was made for 1927, but while the assessment books were in the hands of the board of review for review, on November 8, 1927, a notice in writing was given appellee "that at ten o'clock A. M., Thursday, December 15, 1927, in the hearing room of the board of review of Cook county, Illinois, on the third floor of the county building in Chicago, Illinois, there will be a hearing upon a proposed listing and assessment of net receipts of your agencies in Cook county, Illinois, required to be listed and subject to taxation under section 30 of the act entitled, 'An act to incorporate and to govern fire, marine

and inland navigation insurance companies doing business in the State of Illinois,' approved March 11, 1869, and the acts of the General Assembly amendatory thereof and supplementary thereto, for each of the periods of one year ending April 30 of the years 1923 to 1926, both inclusive, upon which no taxes have been paid, and the listing and assessment of which heretofore attempted to be made for each of said years was illegally made, at which time you are required to attend and will be entitled to be heard." On the same day a like notice was served upon appellee that at the same time and place the board of review would review the listing and assessment made by the board of assessors of the net receipts of appellee's agencies in Cook county required to be listed and subject to taxation for the year ending April 30, 1927, under section 30 of the aforementioned act, and require appellee to file with the clerk of the board of review, on or before November 22, 1927, separate returns in writing for each one of its agencies maintained in Cook county during the year ending April 30, 1927. At the time and place mentioned in the notice appellee appeared before the board of review and an extended hearing was had. It commenced on December 15, 1927, and was continued on the [fol. 407] 16th of December, at which time it was stated that this court was then in session and that a petition for rehearing was pending in Hanover Fire Ins. Co. v. Harding, supra, and that it was likely to be decided before the adjournment of court, which would probably occur within a week. By consent of all parties it was agreed that further proceedings before the board of review should be suspended until such adjournment. It was thought that the decision of the court on the petition for rehearing might settle all the matters in controversy. The petition was denied on December 20, 1927, and thereafter the parties were notified to appear before the board of review on December 28, 1927, at which time the hearing was resumed, all parties being represented by attorneys. A full stenographic report of the hearing is found in the record and seventy-eight pages of it may be found in the abstract. The hearing was informal and consisted of questions by members of the board and statements and counter-statements as to the law and facts, with some admissions of fact by the respective attorneys. The gist of the proceedings was that the attorneys for the taxing body claimed that the returns

by appellee for the years 1923 to 1927, inclusive, were not made in a proper manner; that they were each incorrect by omitting therefrom a large amount of the net receipts of appellee's insurance business in Cook county, and called to the attention of the board certain specified omissions and that appellee had paid no taxes levied on its net receipts for the years 1923 to 1927, inclusive. On its part appellee contended that section 30 was unconstitutional; that appellee was not required to make any return of net receipts; that it had made correct returns; that these returns did not contain the net receipts from certain lines of its insurance business; that in arriving at the net receipts listed it had deducted amounts for overhead, and that the amounts returned only amounted to about seventy-five or eighty per cent of its net receipts; that it had paid no tax at all on them for the years 1923 to 1927, inclusive, and that the net receipts returned had not been scaled and debased, as had the returns on other personal property. Although requested to give the board detailed information as to its gross receipts and as to the deductions made therefrom, appellee offered none and denied that the board of review had any jurisdiction in the matter of the assessment of appellee's net receipts. Thereafter the board of review, acting on the best information attainable, without further [fol. 408] notice to appellee increased the amount of the assessment for each of the five specified years, and taxes were levied thereon, which not being paid, this suit was brought for their recovery.

On the trial it was stipulated by the parties that defendant might introduce any evidence which would be admissible in equity under appropriate pleadings and any evidence which would be competent in support of a bill to restrain the collection of the taxes, plaintiff waiving any objection to the jurisdiction of the court to entertain and give effect to any equitable cause of action or defense in favor of defendant, and that the court might enter such judgment or decree as may be appropriate to and in conformity with the evidence, so that defendant can have the same relief to which it would be entitled under a bill to restrain the collection of the taxes; that defendant may offer evidence proving that (a) the assessment of the taxes by the board of review was fraudulent and void; (b) that

the board of review had no power to assess net receipts taxes for the years in question as omitted net receipts or as omitted property taxes; (c) that the omitted net receipts taxes assessed for the years in question were void and uncollectible; and (d) that section 30 of the act of 1869 is unconstitutional and void. It was also stipulated, in substance, that during the years in question various non-incorporated foreign associations, various individuals, various so-called Lloyds and various domestic fire insurance companies were lawfully engaged in transacting the business of fire, marine and inland navigation insurance in Illinois in competition with defendant and all other foreign incorporated fire insurance companies during that period lawfully transacting the business of fire, marine and inland navigation insurance, and that said non-incorporated foreign associations, individuals, Lloyds and domestic insurance corporations during said years were not assessed for taxation upon their several net receipts covering fire, marine and inland navigation insurance risks assumed by them in Illinois, or upon any real or personal property other than net receipts, like all other property owners and tax-payers, and that said foreign stock fire insurance companies were assessed for taxation upon their net receipts derived from such competitive business; that foreign casualty insurance companies also carried on such competitive business and were not taxed on their net receipts derived therefrom. The questions arising by reason of these stipulations were fully discussed and decided in People v. Franklin Nat. Ins. Co. supra.

[fol. 409] Section 276 of the Revenue act provides:

"If any real or personal property shall be omitted in the assessment of any year or number of years, or the tax thereon, for which such property was liable, from any cause has not been paid, or if any such property, by reason of defective description or assessment thereof, shall fail to pay taxes for any year or years, in either case the same, when discovered, shall be listed and assessed by the assessor and placed on the assessment and tax books. The arrearages of tax which might have been assessed, with ten per cent interest thereon, from the time the same ought to have been paid, shall be charged against such property by the county clerk. It shall be the duty of county clerks to

add uncollected personal property tax to the tax of any subsequent year, whenever they may find the person owing such uncollected tax assessed for any subsequent year."

It is claimed by appellee that it having made returns of its net receipts for the years 1923 to 1926, inclusive, and the taxing authorities having accepted such returns as correct and assessed taxes thereon, its net receipts for those years could not be classified as omitted property and assessed by the board of review in 1927 even though the net receipts for such years exceeded the amount returned. If a property owner has not been assessed on credits at all, the board of review may in subsequent years assess credits owned by him but which were omitted, but if credits have been assessed by the assessor and the taxes extended thereon have been paid, the board of review in subsequent years has no authority to increase such assessment, either upon the theory that it was too low or that the board there assessed omitted credits. (People v. Hunt, 311 Ill. 291; Warner v. Campbell, 238 id. 630; Barkley v. Dale, 213 id. 614.) In those cases it was held that the assessor is required, in determining the value of property assessed, to exercise his judgment, and that his acts are in the nature of judicial acts and not subject to review by his successor or succeeding boards of review for errors of judgment. Section 277 of the Revenue act, however, provides:

"If the tax or assessment on property liable to taxation is prevented from being collected for any year or years, by reason of any erroneous proceeding or other cause, the amount of such tax or assessment which such property shall have paid may be added to the tax on such property for any subsequent year, in separate columns designating the year or years."

[fol. 410] In the instant case appellee made its return of net receipts for the years 1923 to 1926, inclusive. Such returns were received and accepted as correct by the assessor, acted upon by the taxing bodies and taxes extended thereon. The taxes extended were not legal, for the reason that the amounts returned as net receipts were not scaled and debased as the returns of other personal property were in the extension of the taxes. They were not omitted property, as a return had been made which was accepted by

the assessor as correct. In People v. Missouri Pacific Railroad Co., 301 Ill. 541, it is said:

"It is the levy which creates the tax, and the extension by the county clerk is merely a formal step necessary to enable the authorities to collect the tax. The legislature recognized that a situation like the one before us might arise, and so it provided by section 277 of the Revenue act that if a tax on property liable to taxation is prevented from being collected for any year or years by reason of any erroneous proceeding or other cause, the amount of such tax or assessment which such property should have paid may be added to the tax on such property for any subsequent year."

While the board of review was not authorized in 1927 to assess appellee for omitted net receipts, yet such receipts were liable to taxation for those years, and the collection of such taxes having been prevented by erroneous proceedings, the amount of such tax or assessment which such property should have paid could be added to the assessment on such property for the year 1927 by the board of review, and the tax extended in 1927 for the years 1923 to 1926, inclusive, was legal to the extent that it was based on the returns made by appellee and accepted by the assessors during such years.

One of the findings of the trial court on the basis of which its judgment was entered was, that "the assessment of omitted net receipts for the years 1923, 1924, 1925 and 1926, and the net receipts for the year 1927, made by the board of review, all in 1928, was made without the exercise of honest judgment by the board of review and at the mere will of said board." This finding has no basis in the evidence. The transcript of proceedings before the board of review shows that the board manifested a marked desire to do justice to all parties and repeatedly tried to get from the attorneys for appellee figures which would meet the requirements of the law and could be used as the basis of an assessment satisfactory to both parties, but without success.

[fol. 411] One of the findings of the trial court was, that the valuations of so-called omitted net receipts adopted by the board of review in 1928 for the five years in question were prepared by one Seeley, an assistant corporation counsel,

who was under contract with the city of Chicago whereby he was to receive a fee contingent upon the amount collected, and that his valuations "were listed as valuations of net receipts upon the books of the board of review of Cook county without consideration by the board and assessed at the board rates applicable, and that the taxes so extended upon the assessment so made were fraudulent and null and void." Upon the trial Seeley was called as a witness by appellee and testified to the investigations he had made in the reports of appellee to the city and the State and the discrepancies found in appellee's returns of net receipts to the assessor. He also testified to the comparison of appellee's returns and reports with the returns and reports of other companies engaged in the same lines of insurance. As a result of his investigations he made computations and estimates as to the amount of appellee's net receipts upon slips of paper, which estimates and computations were shown to the members of the board of review having charge of the insurance assessments, at whose direction, after being checked up and verified, they were placed upon the assessment roll and afterwards approved by the entire board. The deductions made from the gross receipts were made according to methods adopted in 1924 by the board of uniformly allowing all foreign insurance companies of this class thirty per cent from the gross receipts for expenses. The slips prepared by Seeley were shown by him in court to the attorney for appellee, and no evidence was introduced by it to show the inaccuracy of his figures or that the assessment as made by the board of review was in excess of the actual net receipts.

Appellee's complaint that after the board of review had determined the amount of assessment appellee did not have notice and an opportunity for a second hearing is not entitled to consideration. The entire board heard appellee with consideration at the extended hearings had, and when it declined to give the board the requested information it cannot be heard to complain that the board proceeded to make the assessment on the best evidence obtainable. It was not necessary that in order to do so it should call in witnesses and act on sworn testimony. It is to be noted that the admissions made by appellee's attorneys at the hearings were taken as the basis for the computations upon [fol. 412] which the amount of the assessments were made.

The testimony of the witnesses called by appellee who made out its returns to the assessor showed that in those returns all receipts from business, other than fire, marine and inland navigation insurance, were omitted. In Hanover Fire Ins. Co. v. Harding, 272 U. S. 494, the Supreme Court of the United States upon this point said:

"The petitioner [i. e., the Hanover Fire Insurance Company,] is an insurance company organized under the laws of the State of New York. By its charter it is authorized to do a business of insurance against the hazard of fire, marine perils, inland navigation, tornado, theft, explosion, property damage to automobile and other property by collision, crop insurance, and other similar lines of insurance against hazards. There are in Illinois domestic insurance companies which do business in all such risks. In Fidelity and Casualty Co. v. Board of Review, 264 Ill. 11, decided in 1914, the Supreme Court held that the only insurance companies whose receipts come within section 30 are foreign fire, marine and inland navigation insurance companies doing business in the State, and if they do business in the other hazards above stated, as the complainant and petitioner is authorized to do, then they must pay taxes on their net receipts, made not only from fire, marine and inland navigation company business but also from the other hazards."

Appellee was authorized by law to do business in the same hazards as the Hanover Fire Insurance Company and did engage in the same in Cook county, and therefore it is liable for taxes on its net receipts from all such hazards.

In Pratt v. Raymond, 188 Ill. 469, where the evidence showed that the board of review in making an assessment acted upon information obtained by its members regarding the property of complainant subject to assessment, from his commercial rating, from men in the same line of business, and from persons who had means of knowing what his personal property was, the court in holding the assessment valid said:

"The principal objections urged against the tax are, that the proceedings of the board of review were irregular in not taking sworn testimony and in assessing complainant on evidence obtained in secrecy from rivals in busi-

ness; that the board did not enter on the assessor's books specific items of personal property which were assessed and the value of the same, and did not enter the full value [fol. 413] but only the assessed value; and that the record is not sufficient to sustain the tax because it does not show the particular items of property and the kind thereof assessed or the values thereof. While the record should show the kinds of property assessed and the value thereof, and the total value, the facts alleged and the objections so urged afford no ground whatever for the exercise of the limited jurisdiction of a court of equity."

In Earl & Wilson v. Raymond, 188 Ill. 15, the tax-payer scheduled its property at $26,000. The board of review caused a notice to be served on the tax-payer to appear before it on a day certain to show cause why the assessment should not be increased. Pursuant to the notice the tax-payer's manager appeared before the board and was referred to one member thereof, who examined him in reference to the assessment. Subsequently the entire board of review, in consideration of the information obtained upon the hearing before the one member of the board and from the facts and information obtained by each member from men engaged in the same line of business as appellant, from its commercial rating and standing at the banks, and from financiers in the city and from other sources, increased the valuation to $40,000. On a bill to enjoin the collection of taxes on the increased amount, this court in sustaining the assessment said:

"All bodies composed of a number of persons may, and generally do, act through committees of one or more to procure facts in reference to the matters to be acted upon and receive recommendations as to the action that should be adopted. * * * Appellant's contention that the action of the board of review is invalid for the reason that the witnesses from whom they obtained information as to the value of appellant's property were not called in and sworn and an opportunity given for cross examination is not well founded. The law gives the board the power, and imposes upon it the duty, of changing any assessment which in their opinion may be incorrect; and in fixing the valuation to be placed upon the tax-pay-

er's property the board may act upon their own knowledge, information and judgment, and are not concluded by the statements of the owner of the property."

In American Express Co. v. Raymond, 189 Ill. 232, where the trial court had dismissed a bill to enjoin the collection of taxes assessed and extended, this court on appeal said:

"The complaint was and is that the board of review of Cook county increased the assessed valuation without affording appellant an opportunity to be heard. It is not denied [fol. 414] that appellant was properly notified to appear before the board and show cause why the assessment on its property should not be increased nor that appellant's agent appeared in pursuance of such notice, but the point made is that there was no hearing of facts relating to the value of appellant's property but only an informal conversation between the members of the board and appellant's agent, together with the agents of other express companies who were present at the same time, relative to their respective assessments. It appears that, adopting the suggestion of a member of the board, the board and the representatives of the several companies assembled around a table in the office of the board and took up the matter of the assessment of all such companies together. The board heard what these representatives had to say, but it does not appear that specific valuations were discussed nor that any decision was announced or reached. The meeting adjourned, or, at any rate, the members of it separated, and the appellant claims that its assessment was afterward increased without its knowledge or any opportunity to be heard in reference thereto and without any notice or information from the board as to the evidence or grounds upon which such increase was based. If appellant desired to make any showing to the board that the schedule and valuations of its property were correct and should not be changed or increased it had the opportunity to do so, and it cannot complain that the board did not produce the evidence upon which it acted in making the increase."

In Leper v. Pulsifer, 37 Ill. 110, the tax-payer had furnished the assessor with lists of personal property valuing his personal property at $11,608, and the assessor not being satisfied with this valuation increased it to $25,000,

and then, under section 8 of the Revenue law as it then was, doubled this amount as a penalty. On a bill to restrain the collection of a tax upon the excess valuation it was held that where the statute gives one aggrieved by an assessment the opportunity to appear before the board for the correction of lists after knowledge of the grievance, and he does so appear but declines to prove that the valuation put upon his own property is excessive, the assessment will be presumed to be correct.

In Cummings v. Webber, 218 Ill. 521, the board of review gave a tax-payer notice to appear before the board of review and show cause why his assessment should not [fol. 415] be increased, and he came before the board but made no showing whatever, and the board of review increased his assessment $93,980 upon credits. In sustaining the assessment this court said:

"Where a tax-payer is notified to appear before the board of review and show cause why his assessment should not be increased, and he fails to improve the opportunity so afforded him to avail of his remedy at law by showing cause against an increase, equity will not interfere to relieve him from an increased assessment on the ground, alone, that such increased assessment is excesive in amount or results in double taxation.—Coxe Bros. & Co. v. Salomon, 188 Ill. 571; Standard Oil Co. v. Magee, 191 id. 84."

When we apply the rules hereinabove stated to the facts of this case we must find that the complaints against the assessment of appellee's net receipts for the year 1927 are not well founded, that equity and good conscience require that the tax levied and assessed thereon should be paid, and that a bill to enjoin the collection of such tax could not be sustained.

While this cause as originally brought was an action in debt, yet by stipulation of the parties the cause of action was changed, proper pleadings were waived and a stipulation entered, in effect, that the court might enter a judgment or decree restraining the collection of all or a part of the taxes for which suit was brought or might enter judgment or decree for all or any part of such taxes, in conformity with the evidence, law, equity and good conscience. It was stipulated by the parties that the tax ex-

tended on appellee's net receipts for the year 1923 on the assessment as made by the board of review was $5,853.40, and that the amount of such tax, if extended on the return of the company, accepted and acted upon by the taxing bodies for that year, scaled and debased in conformity with the assessments on other personal property, would be $2,017. The tax for 1924 extended on the board of review assesment was $7,019.48; if extended on appellee's return made for that year it would be $3,528. The tax extended on the board of review assessment for 1925 was $5,059.58; if extended on appellee's return for that year it would be $4,072. The tax extended on the board of review assessment for 1926 was $6,312.96; if extended on appellee's return for that year it would be $2,694. The tax extended on the board of review assessment for appellee's net receipts for 1927, which we hold to be a valid assessment, was $5,895.19. [fol. 416] Under the evidence in this case, and the rules of law applicable thereto, appellee should pay tax on its net receipts for the year 1923, $2,017; for the year 1924, $3,528; for the year 1925, $4,072; for the year 1926, $2,694, and for the year 1927, $5,895.19, making a total of $18,206.19.

While this court has no power to make a tax assessment, yet it and the circuit court, from which this cause came, have power to set aside taxes which are unlawful, and have likewise, in cases like the present, the power and duty to determine what portion of a tax, if any, is lawful, where such fact can be determined from the record. Under the stipulation in this case the circuit court, a jury trial having been waived, should have entered judgment in favor of appellant against appellee for the sum of $18,206.19 and costs.

The judgment of the circuit court is therefore reversed and judgment is entered here for appellant, against appellee, for the sum of $18,206.19 and costs.

Reversed and judgment for appellant.

[fol. 417] IN SUPREME COURT OF ILLINOIS

No. 21441

PEOPLE OF THE STATE OF ILLINOIS, Appellant,

vs.

CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN, Appellee

Appeal from Circuit Court Cook

JUDGMENT—Oct. 22, 1932

And now, on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid, and in the rendition of the Judgment aforesaid, there is manifest error: Therefore, it is considered by the Court that for that error and others in the record and proceedings aforesaid the Judgment of the Circuit Court of Cook County in this behalf rendered, be reversed, annulled, set aside and wholly for nothing esteemed.

Judgment is entered here for appellant, against appellee, for the sum of $18,206.19 and costs.

And it is further considered by the Court that the said Appellant recover of and from the said Appellee its costs by it in this behalf expended, to be taxed, and that it have execution therefor.

Clerk's certificate to foregoing paper omitted in printing.

[fols. 418-420] Be it remembered that, to-wit, on the 16th day of November, A. D. 1932, the same being one of the days in vacation before the December term of Court, 1932, a certain Petition for Rehearing was filed by Appellee.

[fols. 421 & 422] In Supreme Court of Illinois

[Title omitted]

Order Denying Rehearing—Dec. 5, 1932

Now on this day the Court having duly considered petition for rehearing filed herein by appellee and the Court being now advised in the premises doth overrule the prayer of the petition and denies a rehearing of this cause.

[fol. 423] In Supreme Court of the United States

[Title omitted]

Petition for Appeal—Filed Feb. 8, 1933

To the Honorable Oscar E. Heard, Chief Justice of the Supreme Court of Illinois:

Now comes Concordia Fire Insurance Company, a corporation, defendant and appellant in the above entitled cause, and conceiving itself aggrieved by the rulings of the Supreme Court of Illinois and by the final judgment rendered therein in favor of The People of the State of Illinois and against the Concordia Fire Insurance Company, on the 22nd day of October, A. D. 1932, does hereby petition for the allowance of an appeal from said judgment of the Supreme Court of Illinois to the Supreme Court of the United States, and that a citation be granted, directed to The People of the State of Illinois, Plaintiff, requiring it to appear before the Supreme Court of the United States to do and receive what may appertain to justice in the premises, and for the entry of an order fixing the amount of the bond to be required of the defendant on said appeal, and in connection with its petition for appeal defendant presents herewith its assignments of error and prayer for reversal of said judgment of the Supreme Court of Illinois.

Concordia Fire Insurance Company, a Corporation,
by Frederick D. Silber, Its Counsel.

[fol. 424] [File endorsement omitted.]

[fol. 425] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL.—Filed Feb. 8, 1933

Upon the petition of Concordia Fire Insurance Company, a corporation, defendant in the above entitled cause, praying for the allowance of an appeal to the Supreme Court of the United States from the Supreme Court of Illinois, the appeal is hereby allowed upon giving bond in the sum of Twenty Thousand Dollars ($20,000.00).

Dated this 8th day of February, A. D. 1933.

Oscar E. Heard, Chief Justice of the Supreme Court of Illinois.

[fol. 426] [File endorsement omitted.]

[fols. 427 & 428] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER STAYING EXECUTION.—Filed Feb. 8, 1933

This cause coming on for hearing on the petition for the allowance of an appeal by Concordia Fire Insurance Company, a corporation, and the appeal having been allowed upon the filing of a bond in the sum of Twenty Thousand Dollars ($20,000.00), and the Concordia Fire Insurance Company, a corporation, having filed herein a bond in the penal sum of Twenty Thousand Dollars ($20,000.00), and said bond having been duly approved:

It is ordered that execution to enforce the judgment heretofore rendered by the Supreme Court of Illinois on the 22nd day of October, 1932, in favor of the People of the State of Illinois, plaintiff, against the Concordia Fire Insurance Company, a corporation, defendant, in the amount of Eighteen Thousand Two Hundred Six and 19/100 Dollars ($18,206.19), be stayed until further order of the Court.

Oscar E. Heard, Chief Justice of the Supreme Court of Illinois.

[File endorsement omitted.]

[fols. 429-432] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATE OF ILLINOIS,
County of Cook, ss:

Frederick D. Silber, being first duly sworn, on oath deposes and says that on February 9th, 1933, he served a certified copy of the attached order of the Supreme Court of Illinois, staying execution in said cause until the further order of the court, upon the Clerk of the Circuit Court of Cook County, by delivering the said certified copy of said order to Mannie Wolf, a deputy clerk in the office of said Clerk of the Circuit Court of Cook County duly authorized to receive service on behalf of said Clerk.

Dated Chicago, Illinois, February 9th, 1933.

Frederick D. Silber.

Subscribed and sworn to before me this 9th day of February, A. D. 1933. Emma F. Holmes, Notary Public, Cook County, Illinois. (Seal of Emma F. Holmes, Notary Public, Cook County, Illinois.)

[fol. 433] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR Filed Feb. 8, 1933

And now comes Concordia Fire Insurance Company, a corporation, appellant in the above entitled cause, and avers and shows that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Illinois in the above entitled cause, the Supreme Court of the State of Illinois erred to the grievous injury and wrong of the appellant herein, and to the prejudice and against the rights of the appellant, in the following particulars, to wit:

1. The Supreme Court of the State of Illinois erred in adjudicating and deciding that Section 30 of an Act of the General Assembly of the State of Illinois entitled "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois", approved and in force March 11th, 1869, as amended by an Act approved May 31st, 1879, and in force July 1st, 1879, was and is a good and valid enactment, and

was and is not repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Illinois erred in denying the claim of the appellant that said Section 30 was repugnant to Section 1 of the Fourteenth Article of Amend-[fol. 434] ment to the Constitution of the United States, in that appellant, being a corporation organized under the laws of the State of Wisconsin, and transacting the business of insurance in the State of Illinois, after having paid to said State of Illinois a tax for the privilege of carrying on its said business in Illinois, and having secured the license, permission and authority of the State of Illinois so to transact the said business of insurance, was held subject to and taxed on its net receipts derived from insurance against lightning, earthquakes, windstorms, cyclones, tornadoes, tempests, hail, frost, snow, ice, sleet, weather, flood, rain, drought, bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, explosions (other than steam boiler), sprinkler leakage, and general automobile and vehicle insurance, while casualty insurance companies organized under the laws of states other than the State of Illinois, foreign unincorporated associations, Lloyds, foreign mutuals, reciprocals and other associations of individuals, constituting foreign insurers, and doing business in the State of Illinois, in direct competition with appellant in the business of insuring against the foregoing hazards were and are not subject to a tax on the net receipts derived by such other insurers from such hazards.

3. The Supreme Court of the State of Illinois erred in denying the claim of the appellant that said Section 30 was repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that appellant being a corporation organized under the laws of the State of Wisconsin, and transacting the business of insurance in the State of Illinois, after having paid to the said State of Illinois a tax for the privilege of carrying on its said business in Illinois, and having secured the license, [fol. 435] permission and authority of the State of Illinois so to transact the said business of insurance, was held subject to and taxed on its net receipts derived from hazards of fire, marine, and inland navigation insurance, while do

mestic insurance companies in direct competition with the appellant insuring against the hazards of fire, marine and inland navigation were exempted from the payment of any similar tax on premiums derived by them from the same classes of business.

4. The Supreme Court of the State of Illinois erred in denying the claim of appellant that said Section 30 was repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that appellant being a corporation organized under the Laws of the State of Wisconsin, and transacting the business of insurance in the State of Illinois, and having paid the said State of Illinois a privilege tax for such purpose, and secured permission and authority from the said state so to transact the business of insurance, was subject to a tax on its net receipts derived from said business of insurance, and was denied the right to deduct its losses from its gross receipts in determining the amount of its net receipts, while domestic insurance companies insuring against similar hazards were permitted to deduct the amount of their losses and were not required to pay a tax thereon.

5. The Supreme Court of the State of Illinois erred in denying the claim of appellant that the tax levied for the year 1927 on appellant's net receipts, pursuant to an assessment made by the Board of Review and the judgment sought to be enforced thereunder, was repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that it deprived the appellant of its property without due process of law, by reason of the fact that the Board of Review of Cook County [fol. 436] delegated to an individual the determination of the amount of the net receipts of the appellant for the year 1927, and adopted without further consideration the amount so calculated by said individual, who by reason of contracts theretofore entered into with the taxing bodies of Cook County, of which he was one of the beneficiaries, had a direct financial interest in the proceeds of any tax levied and assessed against the appellant, the extent of said interest being a percentage of the amount of such tax as might be assessed and collected.

6. The Supreme Court of the State of Illinois erred in denying the claim of appellant that the tax levied for the

year 1927 on appellant's net receipts, pursuant to an assessment made by the Board of Review, and the judgment sought to be enforced thereunder, was repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that it deprived appellant of its property without due process of law, by reason of the fact that the said assessment was made by the Board of Review of Cook County at its mere will and caprice, and without the exercise of honest judgment on the part of the said Board of Review of Cook County.

7. The Supreme Court of the State of Illinois, by its final judgment and decision, denied to the appellant the equal protection of the laws in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the Board of Review of Cook County in the assessment of taxes upon all other personal property for the year 1927, uniformly, systematically, and deliberately valued such property at only sixty per cent of its true, actual, full value, whereas the Board of Review in making its assessments against the net receipts of the [fol. 437] appellant, did not take sixty per cent of the true, actual, full value thereof, but assessed said net receipts at one hundred per cent of their value instead of at sixty per cent, as all other personal property was assessed.

8. The Supreme Court of the State of Illinois erred in reversing the judgment of the Circuit Court of Cook County, and erred in entering judgment against the appellant, which said action, ruling and adjudication of the Supreme Court of the State of Illinois are in contravention of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

Wherefore, for these and other manifest errors appearing in the record, the said Concordia Fire Insurance Company, a corporation, appellant, prays that the judgment of the said Supreme Court of the State of Illinois be reversed, annulled and set aside, and held for naught, and that full justice be done it in the premises, etc.

Concordia Fire Insurance Company, a Corporation,
by Frederick D. Silber, Its Counsel.

[fol. 438] [File endorsement omitted.]

[fols. 439-467] Bond on appeal for $20,000, approved and filed February 8, 1933, omitted in printing.

[fols. 468-490] Citation, in usual form, showing service on Thomas J. Courtney et al., filed February 10, 1933, omitted in printing.

[fol. 491] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed Feb. 17, 1931

It is hereby stipulated by and between the parties to the above entitled appeal, by their respective counsel, that the Clerk of the Supreme Court of Illinois may include in the record for appeal to be filed in the office of the Clerk of the United States Supreme Court, the following items:

1. Amended declaration.
2. Demurrer to declaration.
3. Order of June 7th, 1930, overruling demurrer to amended declaration.
4. Pleas of defendant appellant filed June 21st, 1930.
5. Order entered November 21st, 1930, withdrawing plaintiff's demurrer and including stipulation that defendant may offer under general issue any evidence admissible under any form of pleading.
6. Plea of nil debet filed November 21st, 1930.
7. Judgment order entered March 21st, 1932.
8. Bill of exceptions.
9. Judgment of Supreme Court of Illinois entered October 22nd, 1932, and opinion of the court.
10. Order denying petition for rehearing.
11. Order denying motion of defendant appellant to vacate judgment of the Supreme Court of Illinois.

[fol. 492] 12. Petition for appeal.

13. Order allowing appeal to the Supreme Court of the United States.
14. Citation, with proof of service thereon.
15. Appeal bond and approval thereof.
16. Assignment of errors.
17. Order staying execution.
18. Statement showing jurisdiction of the Supreme Court of the United States to entertain appeal.

19. Statement by appellee making against jurisdiction of the Supreme Court of the United States, together with motion by appellee to dismiss the appeal or to affirm the judgment of the Supreme Court of Illinois.

20. Certificate of the Clerk of the Supreme Court of Illinois.

Frederick D. Silber, Counsel for Appellant. Thomas J. Courtney, Leon Hornstein, Louis H. Geiman, Harris F. Williams, Hiram T. Gilbert, Counsel for Appellee.

Dated Chicago, February 15, 1933.

[fol. 493] [File endorsement omitted.]

[fol. 494] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 495] Clerk's return omitted in printing.

[fols. 496 & 496½] IN SUPREME COURT OF THE UNITED STATES

NOTICE

To Thomas J. Courtney, Leon Hornstein, Louis H. Geiman, Harris F. Williams, Hiram T. Gilbert, counsel for appellee:

We herewith serve upon you statement of points upon which appellant intends to rely in the above entitled cause, as provided for in Paragraph 9 of Rule 13 of the rules of the Supreme Court of the United States.

Frederick D. Silber, Counsel for Appellant.

Received a copy of the above and foregoing notice this 20th day of March, A. D. 1933.

Thomas J. Courtney, Leon Hornstein, Louis H. Geiman, Harris F. Williams, Hiram T. Gilbert.

[fol. 497] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY—Filed March 22, 1933

1. That Section 30 of an act of the general assembly of the State of Illinois, entitled "An Act to Incorporate and

to Govern fire, marine, and inland navigation insurance companies, doing business in the State of Illinois", approved and in force March 11th, 1869, as amended by an act approved May 31st, 1879, and in force July 1st, 1879, was and is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

2. That Section 30 of the Act of 1869 under which appellant is required to return and be assessed, both on net receipts derived from insuring against the risks of fire, marine and inland navigation, when domestic insurance companies are exempted from the payment of taxes on similar net receipts derived by them from the transaction of competitive business with appellant, upon the same risks and in the same territory in Illinois, was and is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

[fol. 498] 3. That Section 30 of the Act of 1869, in so far as it has been construed by the Supreme Court of Illinois to deny to the appellant the right to deduct its paid losses from its gross receipts, in determining its net receipts subject to tax, when domestic fire insurance companies in direct compensation with the appellant in insuring the same risks in the same territory in Illinois, are taxed only upon the remainder of their receipts after the deduction of their losses, was and is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

4. That Section 30 of the Act of 1869 was and is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that appellant being a corporation organized under the laws of the State of Wisconsin and transacting the business of insurance in the State of Illinois, and having paid to the said State of Illinois a tax for the privilege of carrying on its said business in Illinois, and having secured the license, permission and authority of the State of Illinois so to transact the said business of insurance; was held subject to and taxed on its net receipts derived from insuring against lightning, earthquakes, windstorms, cyclones, tornadoes, tempests, hail, frost, snow, ice, sleet, weather, flood, rain, drought, bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, explosions (other than

steam boiler), sprinkler leakage, and general automobile and vehicle insurance, while casualty insurance companies organized under the laws of states other than the State of Illinois, foreign unincorporated associations, Lloyds, foreign mutuals, reciprocals and other associations of individuals, constituting foreign insurers and doing business in the State of Illinois, in direct competition with appel-[fol. 499] lant in the business of insuring against the foregoing hazards, were and are not subject to a tax on the net receipts derived by such other insurers from such hazards.

5. That the Supreme Court of the State of Illinois failed to follow and misunderstood the rulings of this Court in Hanover Fire Insurance Company v. Harding, 272 U. S. 494.

6. That appellant's net receipts derived from risks other than fire, marine and inland navigation insurance were not taxable under Section 30 of the Act of 1869.

7. That the tax levied against appellant for the year 1927 on appellant's net receipts pursuant to an assessment made by the Board of Review, and the judgment sought to be enforced thereunder was and is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that it deprived the appellant of its property without due process of law, by reason of the fact that the Board of Review of Cook County delegated to one, Herman B. Seeley, the determination of the amount of the net receipts of the appellant for the year 1927, and adopted without further consideration the amount so calculated by said Seeley, who by reason of contracts theretofore entered into with the taxing bodies of which contracts he was one of the beneficiaries, had a direct financial interest in the proceeds of any tax levied and assessed against the appellant, the extent of said interest being a percentage of the amount of such tax as might be assessed and collected.

8. That the tax levied for the year 1927 on appellant's net receipts, pursuant to an assessment made by the Board of Review, and the judgment sought to be enforced there-[fols. 500 & 500a] under, was and is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that it denied to the appellant the equal protection of the laws, in that the Board of Review

of Cook County in the assessment of taxes upon all other personal property for the year 1927, uniformly, systematically, and deliberately valued such property at only sixty per cent of its true, actual, full value, whereas the Board of Review in making its assessments against the net receipts of the appellant did not take sixty per cent of the true, actual, full value thereof, but assessed said net receipts at one hundred per cent of their value, instead of at sixty per cent, as all other personal property was assessed.

9. That the tax levied for the year 1927 on appellant's net receipts, pursuant to an assessment made by the Board of Review in 1928, and the judgment sought to be enforced thereunder, was and is repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that a prior assessment had been levied upon the identical net receipts so assessed in 1928 by the Board of Review of Cook County; that taxes had been extended upon such prior assessment against the appellant, and that liability for the payment of such prior tax so extended remains of record against the appellant; that the net receipts assessed in the year 1928 were the same and identical net receipts theretofore assessed and extended as aforesaid; that the assessment so made in 1928 for the year 1927 was null and void, in that it subjected appellant to double taxation on the same property, and the judgment sought to be enforced thereunder constitutes a deprivation of the property of the appellant without due process of law, and a denial to the appellant of the equal protection of the laws.

Frederick D. Silber, Counsel for Appellant.

[fol. 500b] [File endorsement omitted.]

[fol. 501] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING RECORD—Filed March 18, 1933

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective counsel, that the Clerk of this Court, when printing the transcript of the record, shall print the following portions of the record only:

1. Placita of the Supreme Court of Illinois and of the Circuit Court of Cook County, Record pages 1, 2 and 3.

2. Plaintiff's declaration, Record pages 4, 5 and 6.

3. Order of the Circuit Court, Record page 19.

4. Finding and judgment of the Circuit Court of Cook County, Record pages 22 and 23.

5. Bill of exceptions. It is stipulated that in lieu of printing the bill of exceptions contained in the record proper, the Clerk shall print the abstract of the bill of exceptions accompanying this stipulation, which abstract of the bill of exceptions is contained in said printed ab- [fol. 502] stract of the record from page 6, beginning with the words "Abstract of the bill of exceptions", to page 197, closing with the words "To the entry of which judgment plaintiffs then and there excepted", on said page 197, and in printing said abstract of the bill of exceptions the printed marginal pages referring to the original record in the Supreme Court of Illinois shall be omitted and the corrected marginal pages, referring to the record filed in the Supreme Court of the United States, shall be inserted.

6. Assignment of errors, Record pages 398 to 402.

7. Opinion of the Supreme Court of Illinois, Record pages 404 to 416.

8. Order of reversal and for judgment for $18,206.19, Record page 417.

9. Filing of petition for rehearing November 16th, 1932, Record page 418 (but such petition for rehearing is not to be printed).

10. Order denying petition for rehearing made December 9th, 1932, Record page 421.

11. Petition for appeal filed by appellant allowed and order allowing appeal and staying execution pending appeal, Record page 422.

12. Petition for appeal, Record page 423.

13. Order allowing appeal, Record page 425.

14. Order approving appeal bond and staying execution, [fol. 503] Record page 427.

15. Proof of service on Clerk of the Circuit Court of Cook County of order staying execution, Record page 429.

16. Assignment of errors and prayer for reversal of judgment, Record pages 432 to 437.

17. Bond for appeal, Record pages 439 to 444.

18. Statement sustaining jurisdiction of the Supreme Court of the United States, Record pages 445 to 465.

19. Proof of service of citation on appellee on February 9th, 1933, Record pages 468 and 469.

20. Notice by appellant to appellee of the allowance of appeal, approval of the appeal bond and the stay of execution and of Section 3 of Rule 12 of the Supreme Court of the United States, Record pages 473 and 474.

21. Statement of appellee making against jurisdiction of the Supreme Court of the United States, together with proof of service on counsel for appellant, Record pages 476 to 488.

22. Stipulation for preparation of transcript of the record for the Supreme Court of the United States, signed by counsel for the respective parties, Record pages 490 to 492.

[fols. 504 & 505] 23. Certificate of the Clerk of the Supreme Court of Illinois to the correctness of the transcript of the record, dated March 8th, 1933, Record page 494.

24. Certificate of the Clerk of the Supreme Court of Illinois as to the transmission of the duly certified transcript of portions of the record, as per stipulation of counsel incorporated therein, dated March 8th, 1933, Record page 495.

Frederick D. Silber, Counsel for Appellant. Thomas J. Courtney, Leon Hornstein, Louis H. Geiman, Harris F. Williams, Hiram T. Gilbert, Counsel for Appellee.

Dated Chicago, Illinois, March 15th, 1933.

[fol. 506] [File endorsement omitted.]

Endorsed on cover: File No. 37,487. Illinois Supreme Court. Term No. 790. Concordia Fire Insurance Company, appellant, vs. The People of the State of Illinois. Filed March 18, 1933. File No. 37,487.

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Insurance Act of the State of Illinois of March 11, 1869, Section 30 (Laws of 1869, page 209), as amended by the Act of May 31, 1879. (Cahill's Revised Statutes, 1931, Chapter 73 Section 159) 1, 2, 4, 5
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 790

CONCORDIA FIRE INSURANCE COMPANY,

APPELLANT,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT SUSTAINING JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW UPON APPEAL THE JUDGMENT OF THE SUPREME COURT OF ILLINOIS.

I.

Statutory Provision Sustaining Jurisdiction.

The final judgment of the Supreme Court of Illinois drew into question the validity of an Illinois statute (Section 30 of the Insurance Act of March 11, 1869, *as amended by the Act of May* 31, 1879, *now Cahill's*

Revised Statutes, 1931, *Chapter* 73, *Section* 159) *on the ground that it is repugnant to the Fourteenth Article of Amendment to the Constitution of the United States. The decision of the Supreme Court of Illinois was in favor of the validity of the statute. Therefore, the judgment of the Supreme Court of Illinois is reviewable under United States Code, Title* 28, *Section* 344 (*Judicial Code, Section* 237).

II.

Statute Involved.

The statute of Illinois which appellant contends has been so construed and applied as to render it unconstitutional is Section 30 *of the Act of* 1869, *styled "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois", in force March* 11, 1869, *as amended by Act approved May* 31, 1879, *in force July* 1, 1879, *being Cahill's* 1931 *Revised Statutes, Chapter* 73, *Section* 159, *reading as follows:*

> "Every agent of any insurance company incorporated by the authority of any other state or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—state, county, town and municipal—that other personal property is subject to at the place where located; said tax

to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed; *Provided,* that the provisions of this section shall not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent, in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city."

III.

Date of Judgment Sought to be Reviewed.

The judgment of the Supreme Court of Illinois sought to be reviewed herein was rendered on October 22nd, 1932. *A petition for rehearing was denied by the said court on December 9th,* 1932. *The application for appeal was presented February 4th,* 1933.

IV.

Statement of the Nature of the Case.

The Supreme Court of Illinois, on October 22, 1932, reversed the judgment of the Circuit Court of Cook County theretofore rendered in favor of the defendant, Concordia Fire Insurance Company, and entered judgment in favor of The People of the State of Illinois and against the defendant for $18,206.19. The defendant, within the time fixed by the rules of the Supreme Court of Illinois, filed its petition for rehearing, which was denied on December 9, 1932. The

opinion of the Supreme Court of Illinois is reported in 350 Illinois 365.

This suit was instituted in the Circuit Court of Cook County on November 8, 1928, and sought to recover the total sum of $30,140.61 as "omitted net receipts" taxes assessed by the Board of Review of Cook County in the year 1928, for the five preceding tax years, as follows:

For the year 1923	$5,853 40
For the year 1924	7,019 48
For the year 1925	5,059 58
For the year 1926	6,312 96
For the year 1927	5,895 19

In making the foregoing assessments for the years 1923 to 1926, the Board of Review purported to act under Section 276 of the Revenue Act of 1872, and Section 35 of the Revenue Act of 1898, empowering the Board of Review in subsequent years to assess property subject to tax in prior years and omitted from assessment in such prior years (as to the 1927 assessment, the Supreme Court ultimately held that the Board of Review was reviewing a current assessment and not making an original assessment of omitted property; this raises special questions as to the validity of the 1927 assessment by the Board of Review to which we shall refer hereafter). The source for the imposition of these assessments was Section 30 of the Act of 1869, entitled "An Act to Incorporate and to Govern Fire, Marine and Inland Navigation Insurance Companies Doing Business in the State of Illinois",

approved and in force March 11th and July 1st, 1869 (Laws of 1869, p. 209) (Cahill's 1931 Illinois Revised Statutes, Chap. 73, Sec. 159), already quoted *verbatim* herein, pages 2-3, and heretofore passed upon and held invalid in application in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, 71 L. Ed. 372, which reversed the judgment of the Supreme Court of Illinois in *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366. The Supreme Court of Illinois there held that Section 30 of the Insurance Act of 1869 exacted an excise, business or occupation tax, and that payment by the insurance company of the two per cent (2%) privilege tax upon gross premiums to the state under the privilege tax of 1919 (Laws of 1919, p. 628), in force July 1st, 1919, entitled "An Act in Relation to the Taxation of Non-Resident corporations, companies and associations for the Privilege of doing an Insurance Business in this State", did not prevent the imposition of a further excise tax for the continuing privilege of doing business in the state, and that, so considered the tax assessed was constitutional under both the state and federal constitutions. The opinion was by four of the Justices, and a dissenting opinion was filed by three Justices. A writ of error was prosecuted by the Hanover Fire Insurance Company; the judgment and decree of the Supreme Court of Illinois was reversed, and the tax assessed was held to be unconstitutional and void because of the discrimination against foreign stock fire insurance companies who were taxed upon one hundred per cent (100%) of their net receipts, after being admitted to do busi-

ness in the state, when competing domestic insurance companies were taxed upon only 30% of their property.

Upon the filing of the mandate in the Supreme Court of Illinois, that court, by a four to three decision, held, 327 Illinois 590, that Section 30 of the Insurance Act of 1869 did *not* create an excise, business or occupation tax, but on the contrary, imposed a property tax; that net receipts constituted personal property, and that under the Act of 1869 such net receipts should be scaled, debased and equalized in the same way as other personal property and the going tax rate applied to the debased and equalized figure for extension and calculation of taxes. The majority of the Court were further of the opinion that Section 30, although taken out of the Revenue Act of 1853 and retained in the Insurance Act for over fifty years without change, should be read and construed in connection with the Revenue Act, and that the provisions of the Revenue Act for valuation, assessment, extension and collection of taxes should be applied. The majority of the Court were further of the opinion that the Supreme Court of the United States had not declared Section 30 to be unconstitutional, and, in order to save a part of the tax in litigation, the Supreme Court of Illinois renounced its prior construction of Section 30 of the Insurance Act of 1869. No appeal was prosecuted by the Hanover Fire Insurance Company to review the validity of the construction given the mandate of the Supreme Court of the United States by the Supreme Court of Illinois.

The instant case was tried in the Circuit Court of Cook County under a stipulation that the defendant might introduce any evidence which would be admissible in equity under appropriate pleadings, in support of a bill to restrain the collection of the taxes, the plaintiff waiving any objection to the jurisdiction of the Court to entertain and give effect to any equitable cause of action or defense that the defendant might have; that the Court should enter such judgment or decree as might be appropriate to and in conformity with the evidence so that the defendant could have the same relief to which it would be entitled under a bill to restrain the collection of the taxes, and that the defendant might offer evidence proving *inter alia:*

(*a*) That the assessment of the taxes by the Board of Review was fraudulent and void.

(*b*) That the Board of Review had no power to assess net receipts taxes for the years in question, as omitted net receipts, or as omitted property taxes.

(*c*) That the omitted net receipts taxes assessed for the years in question were void and uncollectible.

(*d*) That Section 30 of the Act of 1869 was unconstitutional and void.

Upon the trial of the case below, it was established that after the handing down of its opinion the Supreme Court of Illinois in *Hanover Fire Insurance Company* v. *Harding,* 327 Ill. 590, the Board of Review of Cook County, at the instigation of one Herman B. Seeley, a tax ferret who was the beneficiary of a one-third interest in contingent fee contracts ob-

tained from taxing bodies of Cook County by two Chicago law firms (contingent upon collection of taxes alleged to be due from foreign stock fire insurance companies doing business in Cook County, Illinois), caused notices prepared by Seeley to be served on the foreign stock fire insurance companies operating in Cook County, requiring new returns to be filed for net receipts from 1869 to 1927, inclusive, and calling a hearing before the Board of Review for December 15, 1927. Such hearings were had beginning on that date and ending on December 28, 1927. After the conclusion of the hearings, *Seeley* prepared an estimate of the net receipts of each of the foreign stock fire insurance companies doing business in Cook County from the time that such companies began business, going back as far as 1869 in instances, to and including 1927. The Board of Review, without consideration of Seeley's figures, directed its chief clerk to take Seeley's figures as he had prepared them, and to spread them as an assessment of the net receipts in the year 1928 for all of the prior years, including 1923 to 1927, inclusive. This was done and the tax so assessed was placed on the books in the amounts shown in the declaration (*infra*, page 4) for each of the years in question.

As to the Board of Review's assessment for the years 1923 to 1926, inclusive, evidence was introduced upon the trial of the case establishing that the net receipts assessed had not been scaled, debased and equalized as required under the decision of the Supreme Court of Illinois in *Hanover Fire Insurance*

Company v. *Harding*, 327 Ill. 590. Since the Supreme Court of Illinois invalidated the Board of Review's assessment for these years on the ground that it had no jurisdiction to assess the net receipts in question as omitted property, the Board of Review's assessment for these years is no longer involved. As to the assessment for the year 1927, however, the Supreme Court held that the assessment by the Board of Review was of current and not of omitted receipts and sustained it. As to the failure to scale and debase defendant's net receipts as all other personal property in Cook County was scaled and debased in 1927, the members of the Board of Review of Cook County and the members of the Board of Assessors testified that sixty per cent of the full fair cash value of all other property was taken as the full value. Neither Seeley nor the Board of Review took sixty per cent of the net receipts calculated by Seeley as the full value of such net receipts for taxation for the year 1927. The failure of Seeley and the Board of Review to debase to sixty per cent the amount of net receipts calculated by them resulted in a tax upon 100% of the net receipts, instead of upon 60% for 1927.

In support of its contention that the tax assessed was unconstitutional, defendant established upon the trial of the case that defendant had been admitted to do business in Illinois long prior to 1923 and had within the state intangible property consisting of an agency plant of a value in excess of $5,000, which had been built up at large cost and expense; that during the years in question, various non-incorporated foreign

associations, various individuals, various so-called "Lloyds," and various domestic fire insurance companies were lawfully engaged in transacting the business of fire, marine and inland navigation insurance in Illinois, in competition with the defendant and all other foreign incorporated fire insurance companies during that period lawfully transacting the business of fire, marine and inland navigation insurance, and that such non-incorporated foreign associations, individuals, Lloyds, and domestic corporations, during those years, were not assessed for taxation upon their several net receipts, covering fire, marine and inland navigation insurance risks, assumed by them in Illinois, or upon any real or personal property other than net receipts like all other property owners and taxpayers, and that foreign stock fire insurance companies were assessed for taxation upon net receipts derived from such competitive business; that foreign casualty insurance companies also carried on such competitive business and were not taxed on their net receipts derived therefrom. It was also established that the loss ratio of the defendant for the years 1923 to 1927, was not less than forty-five per cent of its premiums received in Cook County, that is—out of every dollar of premium received by the company in Cook County, it was required to pay at least forty-five cents in losses.

The Circuit Court of Cook County, by specific findings, held that the assessments in question were fraudulently made, and that the taxes levied thereon were null and void, and found for the defendant. Upon appeal, the Supreme Court of Illinois reversed the judg-

ment of the Circuit Court of Cook County, and granted the plaintiff a measure of the relief sought (350 Ill. 365). The Court held, following *People* v. *Franklin National Insurance Company*, 343 Ill. 336, that Section 30 of the Act of 1869 was not repugnant to the Fourteenth Article of Amendment to the Constitution of the United States. As to the assessment for the years 1923 to 1926, inclusive, the Court rejected the Seeley assessment on the ground that the Board of Review was without jurisdiction to make an omitted property assessment, and entered judgment for the amount of the tax due, calculated on the basis of scaling and debasing the returns made by the companies. For the year 1927, the court sustained the Seeley assessment, and rejected the contention that the assessment was illegal and void and a deprivation of the property of the defendant without due process of law, by reason of Seeley's agency in assessing such tax and his contingent interest in the amount of the tax assessed, and the further contention that the Board of Review failed to debase the value of defendant's net receipts to sixty per cent as all other property was debased.

The court also held that foreign stock fire insurance companies must pay the net receipts tax on all classes of business, that is, not only on fire, marine and inland navigation risks (specifically mentioned in Section 30), but also on tornado, theft, explosion, property damage to automobiles and other property by collision, crop insurance, and other classes of insurance against like hazards. As to insurance on the hazards other than fire, marine and inland navigation, casualty companies

compete and are not required to pay taxes on their net receipts under the decision of the Supreme Court of Illinois in *Fidelity & Casualty Company* v. *Board of Review*, 264 Ill. 11.

The Supreme Court held under the evidence that the defendant should pay taxes in the following amounts for the years in question:

Net receipts tax for the year ending April 30, 1923	$2,017.00
Net receipts tax for the year ending April 30, 1924	3,528.00
Net receipts tax for the year ending April 30, 1925	4,072.00
Net receipts tax for the year ending April 30, 1926	2,694.00
Net receipts tax for the year ending April 30, 1927	5,895.19

Pursuant to its view of the evidence as to the proper tax to be assessed for each of the years, the court entered its judgment in the aggregate amount of $18,206.19 (as we have already indicated, certain questions arise on the record with reference to the 1927 assessment and tax, imposed under the decision of the court, that do not inhere as to the other years). From the judgment of the Supreme Court of Illinois so rendered, this appeal is prosecuted.

It is necessary to an understanding of the questions now presented to consider the history of Section 30 of the Act of 1869, and of its construction and application by the Supreme Court of Illinois. Section 30 was

originally a part of the Revenue Act of 1853, entitled "An Act for the Assessment of Property, and the Collection of Taxes in counties adopting township organization law." (Session Laws of Illinois, 1853, p. 3, 35.) It was taken out of the Revenue Act in 1869 and was incorporated in the Insurance Act of 1869, where it has ever since remained.

In 1869 the classes of insurance hazards authorized by law to be insured against by fire, marine and inland navigation insurance companies were limited to those named. By subsequent amendments, such companies were authorized to write lightning, windstorm, hail, automobile, explosion, sprinkler leakage, and other classes. In no subsequent amendment to the Act of 1869 was any requirement stated that net receipts arising from such additional business should be subject to any tax under Section 30 of the Act of 1869. In 1899 the Casualty Insurance Act was passed, permitting casualty companies to be organized to insure against accidental injury or death, credit losses, burglary and theft, damage to plate glass, steam boilers and automobiles, and finally to insure against "any other casualty or insurance risk specified in the article of organization, which may lawfully be the subject of insurance and the formation of corporations for insuring against which is not otherwise provided for by these statutes." Under this Act, Section 7 (Cahill's Illinois Statutes, 1931, Chapter 73, Paragraph 453) foreign casualty companies were admitted to transact business in Illinois under the conditions stated.

As to fire, marine and inland navigation insurance companies, an entirely new statute was passed in 1925, describing in detail what classes of business fire companies might transact and repealing the Act of 1885 authorizing insurance against damage by lightning, windstorms, hailstorms, tornadoes and cyclones, and the Act of 1905 as to sprinklers, pumps and fire apparatus (Cahill's 1931 Illinois Statutes, Chapter 73, Paragraph 171). The Act of 1925 was entitled "An Act providing the kinds of business which may be transacted by fire insurance companies", and applied equally to domestic and foreign companies. It included insurance against damage by fire, lightning, earthquake, windstorm, cyclone, tornado, tempest, hail, frost, snow, ice, sleet, weather, flood, rain, drought, bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, explosion other than the explosion of steam boilers, farm insurance, sprinkler leakage or water leakage of any kind through pipes and containers, automobiles and all vehicles, airplanes, seaplanes, dirigibles and other aircraft, including the hazards of burglary, theft or other criminal act, general automobile and vehicle insurance, all perils of navigation, transit or transportation, marine, inland marine, transit or transportation insurance, and other casualties, excepting such as other provisions of the Act gave power to insure against. The Act of 1925 contained no requirement for payment of taxes under Section 30.

The result of this legislation and the Casualty Act taken together was to give to casualty companies, both domestic and foreign, the right to insure all kinds of

risks not covered by the Fire, Marine and Inland Navigation Insurance Act, and in effect to permit casualty companies to write every class of insurance business permitted to fire insurance companies, excepting fire, ocean marine, inland navigation and transportation risks. Thus from 1899 forward there was direct and immediate competition between casualty insurance companies in Illinois and fire, marine and inland navigation insurance companies in such important lines of insurance as automobile, hail, rain, tornado, cyclone, crop and weather insurance, explosion, sprinkler leakage, aircraft and other related lines.

The construction placed by the Supreme Court of Illinois upon Section 30 of the Act of 1869, and upon the Casualty Insurance Act is shown by the following brief outline of the prior decisions of the Supreme Court of Illinois.

In *National Fire Insurance Company* v. *Hanberg*, 215 Ill. 378, decided in 1905, the court held that net receipts meant gross receipts, less operating expenses, not including fire losses, and did not mean net profits, and that therefore foreign fire insurance companies could not deduct their losses paid by them from gross receipts in determining net receipts. At the same time, under the Revenue Act, domestic fire insurance companies were assessable as of April 1st in each year upon the net profits of their business, that is upon what they had left in money or whatever it was invested in, resulting from their gross receipts less the deduction of all operating expenses and losses.

In *Fidelity & Casualty Company* v. *Board of Review*, 264 Ill. 11, decided in 1914, the court held that

Section 30 of the Act of 1869 did not apply to the net receipts of foreign casualty insurance companies authorized to do business in Illinois, and that the tax under Section 30 did not arise under the Revenue Act, but under the Insurance Act. The court further said that the payment of taxes on net receipts was not a condition precedent to the right to do business in Illinois and that the tax on net receipts of foreign insurance companies not arising under the General Revenue Act, the authority, if any, to impose such taxes must be found in some other Act in clear and unambiguous language. As the Casualty Act did not provide for any such tax, the court held that an assessment on net receipts of a foreign casualty insurance company in Cook County, made by the Board of Review, was illegal and set it aside.

In *People* v. *Kent*, 300 Ill. 324, *People* v. *Barrett*, 309 Ill. 53, and *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, the court held that the tax under Section 30 was not a property tax, but was an excise, business or occupation tax, and was not subject to any of the provisions of the Revenue Act, but constituted in effect a license fee for the privilege of doing business in Illinois, in spite of the fact that the Privilege Act of 1919 provided for a fee of two per cent on gross premiums for such license. We have already referred to the reversal of the judgment in *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, by this Court in 272 U. S. 494, 71 L. Ed. 372.

In *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, upon the filing of the mandate from this

Court in the same case, the Court held that the tax under Section 30 was not an excise, business or occupation tax, but was a property tax, and that Section 30 must be read in connection with the Revenue Act of 1898, and subject to the provisions of such Act for the assessment, extension and collection of the tax, and that net receipts must be treated in every respect like other personal property.

In *People* v. *Franklin National Insurance Company*, 343 Ill. 336, the court held Section 30 to be constitutional as against the challenge that it unlawfully discriminated in favor of foreign unincorporated insurers, Lloyd's and other foreign groups who were not required to pay any taxes on competitive business with foreign fire insurance companies under Section 30.

In the case at bar, the court held, *inter alia*, that foreign fire, marine and inland navigation insurance companies were required under Section 30 to pay taxes not only upon net receipts of insurance upon fire, ocean marine and inland navigation and transportation risks, but also upon all other classes of business that they wrote, including automobile, explosion, cyclone and tornado, riot and civil commotion, etc., which they wrote in direct competition with foreign casualty insurance companies and other foreign unincorporated associations and other foreign groups of insurers, none of whom were compelled, under the foregoing decisions of the court construing Section 30, to pay any taxes upon the premiums resulting from such competitive business.

The result of the foregoing statutes and of the decisions of the Supreme Court of Illinois construing them is that

(1) Foreign fire insurance companies must return and pay taxes under Section 30 upon every class of business which they may do, even though such additional classes were not included in the Act of 1869, and although the subsequent acts authorizing the doing of such additional classes did not require payment of taxes under Section 30 as a condition of doing such additional business; while foreign casualty companies, Lloyds and other insurers pay no taxes at all upon such premiums from competitive business;

(2) Foreign fire insurance companies are not permitted to deduct their losses paid from gross receipts in determining net receipts for purposes of taxation under Section 30, while domestic fire insurance companies doing the same kinds of business are permitted to deduct their losses, being taxed only upon what property they have left at the end of each tax year after paying their operating expenses and losses;

(3) Foreign casualty insurance companies and foreign unincorporated associations, Lloyds, and other foreign groups of insurers are permitted to compete directly with foreign fire insurance companies in Illinois, upon all classes of business excepting fire, ocean marine and inland navigation insurance business, but are exempted by the decisions of the Supreme Court of Illinois from the payment of any taxes upon such competitive business under Section 30;

(4) Foreign fire insurance companies are required to pay a privilege tax of two per cent upon gross premiums annually, and are thereby

privileged to do business on the same basis as domestic companies, but the taxes assessed against them under Section 30, after such admission, are arbitrarily discriminatory in favor of all the groups of insurers above mentioned which do not pay net receipts taxes of any kind.

CASES SUSTAINING THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO ENTERTAIN THIS APPEAL.

I.

The construction and application of Section 30 of the Act of 1869, by the Supreme Court of Illinois, compelling appellant to return and be assessed upon all premiums derived from hazards of fire, ocean marine and inland navigation and transportation insurance, and in exempting domestic fire insurance companies from the payment of similar taxes upon premiums derived by them from transacting a competitive business with appellant in Illinois renders Section 30 of the Act of 1869 repugnant to the fourteenth article of amendment of the constitution of the United States in that it deprives appellant of the equal protection of the laws.

Iowa-Des Moines National Bank v. *Bennett*, 284 U. S. 239; 76 L. Ed. 265.

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389; 72 L. Ed. 927.

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494; 71 L. Ed. 372.

Southern Railway v. *Greene*, 216 U. S. 400; 54 L. Ed. 536.

Royster Guano Company v. *Virginia*, 253 U. S. 412; 64 L. Ed. 989.

Bethlehem Motor Co. v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029.

Bell's Gap Railroad Co. v. *Pennsylvania*, 134 U. S. 232; 33 L. Ed. 892, 895.

Kansas City Southern Railway Company v. *Road Improvement District*, 256 U. S. 658; 65 L. Ed. 1151.

Airway Electric Appliance Corp. v. *Day*, 266 U. S. 71; 69 L. Ed. 169.

Louisville Gas & Electric Co. v. *Coleman*, 277 U. S. 32; 72 L. Ed. 770, 773.

Santa Clara Co. v. *Southern Pacific Ry.*, 18 Fed. Rep. 385.

II.

The construction and application of Section 30 of the Act of 1869 by the Supreme Court of Illinois, denying to appellant the right to deduct its losses from gross premiums in determining net receipts subject to taxation under Section 30, when domestic fire insurance corporations competing directly with appellant are in fact allowed to deduct their losses, renders Section 30 of the Act of 1869 repugnant to the fourteenth article of amendment to the Federal constitution in that it deprives appellant of the equal protection of the laws.

National Fire Insurance Company v. *Hauberg*, 215 Ill. 378.

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494, 71 L. Ed. 372.

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927.

Truax v. *Corrigan*, 257 U. S. 312; 66 L. Ed. 254, 259, 260.

Southern Railway Company v. *Greene*, 216 U. S. 400; 54 L. Ed. 536.

Cotting v. *Godard*, 183 U. S. 79; 46 L. Ed. 92.

Frost v. *Corporation Commission*, 278 U. S. 515; 73 L. Ed. 483.

III.

The construction and application of Section 30 of the Act of 1869 by the Supreme Court of Illinois, exempting foreign casualty insurance corporations, Lloyds, foreign unincorporated associations, foreign mutuals, reciprocals and other associations of individuals constituting foreign insurers, from the obligations of Section 30, when by the statutes of Illinois they are permitted to compete directly with appellant on insurances of automobiles for theft, collision and public liability, in sprinkler leakage, tornado and windstorm, hail and crop damage, explosion and other hazards, and are not required to pay any taxes upon premium receipts from such competitive business under Section 30, renders Section 30 of the Act of 1869 repugnant to the fourteenth article of amendment of the constitution of the United States in that it deprives appellant of the equal protection of the laws.

Fidelity and Casualty Company v. *Board of Review*, 264 Ill. 11.

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494, 71 L. Ed. 372.

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927.

Southern Railway Company v. *Greene*, 216 U. S. 400, 54 L. Ed. 536.

Airway Electric Appliance Co. v. *Day*, 266 U. S. 71, 69 L. Ed. 169.

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346, 67 L. Ed. 297.

IV.

The construction and application of Section 30 of the Supreme Court of Illinois, requiring appellant to include in its taxable net receipts premiums derived from insurance hazards outside of fire, ocean marine and inland navigation and transportation risks, and to pay taxes thereon while the foregoing foreign groups are exempt from such return and tax is violative of the rights of appellant under both the Fifth and Fourteenth Articles of Amendment of the Constitution of the United States, and deprives appellant of its property without due process of law and of the equal protection of the laws.

People of the State of Illinois v. *Concordia Fire Insurance Company*, 350 Ill. 365.

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494, 71 L. Ed. 372.

Southern Railway Company v. *Greene*, 216 U. S. 400, 54 L. Ed. 536.

Royster Guano Company v. *Virginia*, 253 U. S. 412, 64 L. Ed. 989.

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927.

V.

The judgment of the Supreme Court of Illinois sustaining the assessment of the Board of Review of Cook County against appellant for the tax year 1927 *is violative of the rights of appellant as against both the Fifth and Fourteenth Articles of Amendment of the Constitution of the United States, and deprives appellant of its property without due process of law and is a denial of the equal protection of the laws in that:*

(1)

The Board of Review of Cook County adopted and spread, without any consideration, an estimate of net receipts of appellant for the tax year 1927 made by Herman B. Seeley, who at the time he made such estimate of net receipts had a direct contingent financial interest in the amount of taxes to be assessed against appellant and stood to profit thereby. The judgment for 1927 taxes based upon the arbitrary assessment so made violates the constitutional amendments aforesaid.

Tumey v. *Ohio*, 273 U. S. 510, 71 L. Ed. 749.

Commissioners of Union Drainage District v. *Smith*, 233 Ill. 417.

Murr v. *City of Naperville*, 210 Ill. 371.

Meyers v. *Shields*, 61 Fed. 713.

(2)

Such assessment of 1927 net receipts taxes did not debase appellant's net receipts to sixty per cent as all other property was then debased in Cook County for purposes of assessment, and thereby such assessment lacked constitutional equality and uniformity as against the Articles of Amendment aforesaid.

Raymond v. *Chicago Union Traction Company*, 207 U. S. 20, 52 L. Ed. 78.

Horn Silver Mining Company v. *New York*, 143 U. S. 305, 36 L. Ed. 164.

Sioux City Bridge Co. v. *Dakota County*, 257 U. S. 652, 66 L. Ed. 417.

Greene v. *Louisville Ry. Co.*, 244 U. S. 499, 61 L. Ed. 1280.

General American Tank Car Co. v. *Day*, 270 U. S. 367, 70 L. Ed. 635.

Chicago Great Western Ry. Co. v. *Kendall*, 266 U. S. 94, 69 L. Ed. 183, 188, 189.

Cumberland Coal Co. v. *Board*, 284 U. S. 23, 76 L. Ed. 146.

Conclusion.

The foregoing statement is respectfully submitted in support of the jurisdiction of the Supreme Court of the United States to review upon appeal the judgment of the Supreme Court of Illinois, heretofore rendered in the above entitled cause.

FREDERICK D. SILBER,
Counsel for Concordia Fire Insurance Company, a Corporation.

(3130)

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IN THE

Supreme Court of the United States

October Term, A. D. 1932.

No. [redacted] 12

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

vs.

CONCORDIA FIRE INSURANCE COMPANY,
a corporation,

Appellant.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM.

FREDERICK D. SILBER,
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HAWKINS & LODMIS CO., LAW PRINTERS, CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1932.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

vs.

CONCORDIA FIRE INSURANCE COMPANY,
a corporation,

Appellant.

BRIEF OF APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS OR AFFIRM.

MAY IT PLEASE THE COURT:

I.

Considerations involved in the disposition of appellee's motion to dismiss.

At page 6 of its typewritten statement making against the jurisdiction of this Court, counsel for appellee concede that this Court has jurisdiction, but argue that it should not be exercised because in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494 the validity of Section 30 of the Act of 1869 (drawn into question in the instant appeal) was considered by the Court, and therefore the validity of taxes imposed upon appellant and now under review in the instant case should not be considered. The precise question involved in the *Hanover case* was whether a tax imposed upon 100% of the net receipts of a foreign stock fire insurance company, after its admission

to the state of Illinois, was unlawfully discriminatory when domestic stock fire insurance corporations were taxed only upon 30% of the full cash value of their personal property. No other discriminatory features of the net receipts tax under Section 30 were required to be or were decided by this Court, since once having arrived at the conclusion that there was the unlawful discrimination above stated, it was unnecessary to go further. Following its usual practice, the Court reversed the judgment of the Supreme Court of Illinois, and remanded the cause for further proceedings not inconsistent with its opinion.

The Supreme Court of Illinois, in three prior cases involving Section 30, *People* v. *Kent*, 300 Ill. 324; *People* v. *Barrett*, 309 Ill. 53, and *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, had construed Section 30 to impose an excise tax in the nature of an occupation or business tax for the privilege of doing business in Illinois. It had stated unequivocally that the tax *was not a property tax* and was not subject to the rules of property taxation and that *it was not imposed under the Revenue Act of 1898* (Cahill's Revised Statutes of Illinois, 1931, Chapter 120), but was imposed under the Insurance Act (Cahill's Revised Statutes of Illinois, 1931, Chapter 73). When the mandate from this Court was filed in the Supreme Court of Illinois, that Court filed a new opinion (327 Ill. 590), three justices dissenting. The majority of the Court held that the tax imposed under Section 30 *was not an excise*, occupation or business tax, *but was a property tax*, and that while it arose under the Insurance Act, that Act should be construed in connection with the Revenue Act and that net receipts should be scaled, debased, equalized and in all respects treated like other personal property. The Court expressly overruled the *Kent*, *Barrett* and *Hanover cases* in respect to what it had there said in reference to the nature of the tax. The three dissenting justices were of opinion

that Section 30 of the Act of 1869 was unconstitutional and void. In its last opinion in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, the Supreme Court of Illinois did not consider or pass upon the unlawful discrimination arising from

(*a*) The exemption from taxation of net receipts in the hands of foreign casualty insurance companies, foreign Lloyds, unincorporated associations and other foreign groups of insurers who were permitted, by the Illinois statutes and decisions, to do a competitive business with foreign stock fire insurance companies in many important classes of risks common to both groups of companies (*Fidelity & Casualty Company* v. *Board of Review*, 264 Ill. 11), whereas the same net receipts in the hands of the foreign stock fire insurance companies were taxed under Section 30;

(*b*) The denial to foreign stock fire insurance companies in Illinois of the right to deduct the losses paid, from their gross receipts, (*National Fire Insurance Company* v. *Hanberg*, 215 Ill. 378) before determining the amount of net receipts subject to tax, when domestic fire insurance corporations doing the same business and receiving the same character of net receipts were permitted to make such deductions, because taxed only upon such net receipts and such other property as remained in their possession on April 1st of each calendar year.

The Supreme Court of Illinois, by its last decision in the *Hanover case*, radically departed from its former pronouncement regarding the nature of the tax arising under and by force of Section 30 of the Act of 1869. It has reversed its position as to the character of the tax from an excise or occupation tax to *a tax on property*. Since its last decision in *Hanover Fire Insurance Company* v.

Harding, the Supreme Court of Illinois, by its opinions and judgments in the instant case and in *People* v. *Franklin National Insurance Company*, 343 Ill. 336 has sanctioned arbitrary discrimination against foreign stock fire insurance corporations and in favor of foreign casualty insurers, incorporated and unincorporated, in the taxation of the same character of property in their hands respectively, *basing such discrimination solely upon the character of the taxpayer*,—that is, whether it is a foreign stock fire insurance corporation or a foreign casualty company, or other foreign insurer, doing the same business in direct competition with foreign fire companies. And it has also sanctioned an arbitrary discrimination in favor of domestic insurance companies by permitting them *to have the benefit of a deduction of their losses paid*, while denying to the foreign stock fire insurance corporations the same deduction.

None of these questions was passed upon by, and some of them were not presented to, this Honorable Court in the *Hanover case*. It is obvious that where only an *excise* tax is under consideration, questions affecting the validity of a *property* tax do not arise. A case involving an occupation tax on net receipts of a foreign corporation, as against an equivalent property tax on 30% of the net receipts of a domestic corporation, cannot and does not present the questions arising on the present record. In addition, the *Hanover case* involved a tax only for the year 1923, while the instant appeal involves a tax for each year from 1923 to 1927 inclusive and raises constitutional questions affecting the validity of such subsequently imposed taxes which could not be and were not presented in the *Hanover case*. Even without appellee's concession that this Court has jurisdiction, the difference in the records of the *Hanover case* and this case and the changes of opinion by the Supreme Court of Illinois since the decision of the *Hanover case* as to the essential nature of the tax arising under

Section 30 create new and different questions, requiring this Court to assume and retain jurisdiction.

Appellee refers to *King* v. *West Virginia*, 216 U. S. 92, and *Leonard* v. *Vicksburg Railroad Co.*, 198 U. S. 416, to the point that where this Court has considered whether a law violates the Fourteenth Amendment, a second appeal or writ of error involving the validity of the same law will not be considered. An examination of these cases shows that they have no bearing upon the disposition of the instant motion. The *King case* involved a second attempt on the part of the plaintiff in error to obtain a review of the constitutionality of an act which had already been sustained by this Court on a prior review allowed the same plaintiff in error. The essential point of distinction rests in the fact that in the *Hanover case* the validity of Section 30 was not sustained, but, on the contrary the tax assessed under it was held to be invalid. In the *Leonard case*, the appeal was dismissed on the familiar principle that the judgment of the State Supreme Court could be sustained on a non-federal ground and that therefore this Court would not review the error assigned. No such principle applies to the case at bar, and as the appellee concedes, this Court has jurisdiction to determine whether Section 30 of the Act of 1869 and the taxes imposed thereunder violate the rights of appellant under the Fourteenth Amendment, the State Supreme Court having passed upon and denied appellant's contention that Section 30 of the Act of 1869 and the taxes imposed thereunder were violative of the guaranties afforded by the Fourteenth Article of Amendment to the Constitution of the United States. This record calls for determination of the validity of taxes levied under Section 30 of the Act of 1869, *now construed as a property tax*, and, therefore raising new questions not considered in the *Hanover case*. The motion to dismiss has no basis and should be denied.

II.

Considerations involved in the disposition of appellee's motion to affirm.

There are involved on the present record the following substantial questions:

1. The constitutionality of the construction and application of Section 30 of the Act of 1869 by the Supreme Court of Illinois, under which appellant is required to return and be assessed upon all net receipts derived from insuring against the risks of fire, marine and inland navigation, when domestic insurance companies are exempted from the payment of taxes upon similar net receipts derived by them from the transaction of competitive business with appellant upon the same risks and in the same territory in Illinois;

2. The constitutionality of the construction and application of Section 30 of the Act of 1869 by the Supreme Court of Illinois, denying to appellant the right to deduct its paid losses from gross receipts in determining net receipts, when competing domestic fire insurance companies are in fact taxed only upon the remainder of their receipts after the deduction of their losses;

3. The constitutionality of the construction and application of Section 30 of the Act of 1869 by the Supreme Court of Illinois, exempting foreign casualty insurance corporations, foreign Lloyds, foreign unincorporated associations, mutuals, reciprocals, and other groups of individuals from taxation under Section 30, when such competitors are by the statutes of Illinois permitted to and do compete directly with appellant in insuring against such hazards as sprinkler

leakage, tornado, hail, windstorm, earthquake, bombardment, invasion, riot, civil war or commotion, military or usurped power, explosion (other than steam boiler) and insuring automobiles against various hazards;

4. As to the specific tax imposed under Section 30 for the tax year 1927, the following additional questions arise:

(*a*) The validity of the assessment made for the tax year 1927 by the Board of Review of Cook County, upon the sole basis of an estimate made by one Herman B. Seeley, a tax ferret, who at the time he made such estimate for assessment of the net receipts of appellant had a direct contingent financial interest, by contract, in the amount of taxes to be collected from appellant, and stood to profit thereby;

(*b*) The constitutional inequality of the assessment made by the Board of Review against appellant for the tax year 1927, due to the failure of the Board of Review to debase appellant's estimated receipts to 60% of such estimated value; all other property in Cook County being debased to 60% of its full, fair cash value as its full value for purposes of assessment.

Arbitrary discrimination in favor of domestic stock fire insurance companies and foreign casualty insurers.

The present appeal again raises, from new and different angles, the constitutional validity of the construction and application by the Supreme Court of Illinois of Section 30 of the Act of 1869, entitled "An Act to incorporate and to govern foreign fire, marine and inland navigation insurance companies doing business in Illinois." In *Han-*

over Fire Insurance Company v. *Harding*, 272 U. S. 494, this Court held that the tax imposed by said section, treated as a privilege or occupation tax (as the Supreme Court of Illinois treated it in *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366), was invalid because unlawfully discriminatory. It is settled by that decision that when a foreign stock fire insurance company pays its privilege tax or admission fee to the State of Illinois, after admission, the burden of taxation for revenue imposed upon it must be no more onerous than that placed upon competing insurance companies insuring against the same hazards. This Court, in so deciding, asserted that, treating the tax in question as an occupation tax, the taxation of net receipts on a basis higher than the taxation of other property in Cook County and upon a basis higher than that imposed upon domestic insurers on kindred property violated the rights of the insurance company, contrary to the Fourteenth Amendment. Upon the coming down of the mandate from this Court in the *Hanover case*, the Supreme Court of Illinois, in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, overruled its prior decisions in *People* v. *Kent*, 300 Ill. 324, *People* v. *Barrett*, 309 Ill. 53 and in *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, and four members of the court of seven held that the tax imposed was not an excise, privilege or occupation tax, but was a property tax and that its constitutionality could be saved by holding that net receipts should be scaled, debased and equalized as all other personal property and taxed at the same rate. Three members of the Court were of opinion that no valid tax could be imposed under Section 30.

In the face of such vacillation and changes in opinion on the part of the Supreme Court of Illinois, appellee argues that acquiescence in the tax for many years on the part of some insurance companies and an alleged settle-

ment by 190 other insurance companies of their net receipts taxes after the decision of the *Hanover case* by this Honorable Court, has a bearing upon the validity of taxes in question. The protracted litigation involving the application and validity of Section 30 in the state courts and in this Court is sufficient answer to this argument.

Appellee seems to contend that the constitutional validity of Section 30 at the time that it was enacted is in question. This is not so. The validity of taxes assessed under that Section, as affected by subsequent decisions of the Supreme Court of Illinois to which we shall refer, is here involved. In 1869 fire insurance companies were permitted to engage in no business except insuring against the hazards of fire, marine and inland navigation. Insurance by fire insurance companies against such hazards as sprinkler leakage, hail, earthquake, lightning, vehicle, theft and collision, rain and crop insurance, riot and civil commotion was then unauthorized. By various amendments to the statutes of Illinois, fire insurance companies were from time to time permitted to write additional risks covering the various classes above described and many others. In none of such amendatory legislation was there any reference to the payment of taxes upon the net receipts of such duly authorized classes of insurance under Section 30. By the Act of 1925 (Cahill's 1931 Revised Statutes of Illinois, Chapter 73, Section 171), all of the classes of hazards against which fire insurance companies might insure were collected and stated, without any specific requirement as to payment of taxes upon the net receipts derived from writing such hazards. In the instant case, the Supreme Court of Illinois held, following the decision of this Court in *Hanover Fire Insurance Company* v. *Harding*, that net receipts derived from all such additional classes were subject to tax.

Up to 1919, there was no privilege tax statute in Illinois. Prior to the decision in *People* v. *Kent*, 300 Ill. 324, no occa-

sion had arisen requiring that Court to consider the nature and operation of the tax imposed by Section 30. On the contrary, in all of the previous decisions of that court affecting the tax under Section 30, it was tacitly assumed (and in that case expressly stated) that the basis of the tax was the consent given by the State of Illinois to a foreign fire insurance company to enter and transact business. True, in one case (*People* v. *Cosmopolitan Insurance Company*, 246 Ill. 442) it was said that net receipts were personal property, but the only point decided was that net receipts might be classified as personal property by the assessing officers. No constitutional question was presented. Prior to the decision of this Court in the *Hanover case*, net receipts were treated differently in different counties in Illinois. In most of the counties they were not returned or taxed at all. In other counties they were assessed and taxed like other personal property.

In the year 1905, the Supreme Court of Illinois in *National Fire Insurance Company* v. *Hanberg*, 215 Ill. 378, held that what constituted "net receipts" under Section 30 was a question of law and that foreign fire insurance corporations were not authorized to deduct their paid losses in ascertaining their net receipts and making their returns for taxation. The case involved only the meaning to be imported into Section 30 and no constitutional question was raised upon the record. Since no federal question was raised, naturally there was no basis for review by this Court.

In 1914, the Supreme Court of Illinois in *Fidelity and Casualty Company* v. *Board of Review*, 264 Ill. 11, held that foreign casualty corporations authorized to do business in Illinois, in direct competition with foreign fire insurance corporations as to certain hazards, were not taxable under Section 30 upon net receipts derived from insuring such hazards. The ground of the decision was that there was nothing in the statute authorizing casualty cor-

porations to do business in Illinois that imposed any net receipts taxes as a condition for such permission. No fire insurance corporation was a party to that suit. The decision was made at a time when there was no privilege tax statute in force.

It was not until the Supreme Court of Illinois first announced in 1921 that net receipts of foreign fire insurance corporations should be taxed at 100% of their full value, whereas other property was taxed at 30% of its full value, that the question of the constitutionality and the construction of Section 30 by that court became the subject of federal review. Thus the argument that Section 30 was valid when passed has no relevance here. The decisions of the Supreme Court of Illinois, denying to foreign fire insurers the right to deduct losses from their gross receipts while permitting domestic fire insurers so to do and in permitting foreign casualty insurers to compete directly with foreign fire insurers and to pay no tax has resulted in such a lack of constitutional uniformity as to render any tax now imposed under Section 30 unconstitutional.

It was stipulated, as part of the record herein, that during the tax years in question foreign casualty companies and other foreign insurers and groups of insurers, including Lloyds and unincorporated associations, competed directly with appellant in writing the various risks which appellant was authorized to and did write in Illinois, and paid *no* taxes on their net receipts derived from such competitive business. These facts, being proved by stipulation, the constitutional questions, framed as above set forth, arise upon the record in the case at bar. This stipulation disposes of appellee's contention that the record does not show the extent of discrimination. In urging upon the Court that the record does not show the amount of taxes paid by casualty companies (Point 4 of motion to affirm) counsel for appellee apparently overlooked the admission by stipula-

tion that foreign casualty insurers were not assessed or taxed *at all* upon their net receipts derived from insuring against the same hazards during the years in question. Therein lies the discrimination complained of.

The annual reports of the Superintendent of Insurance prepared under the authority of the state show the direct competition between casualty and fire insurers in Illinois insuring against the same hazards. Thus for example, total premiums received by fire companies for insuring against the hazard of sprinkler leakage for the years 1924 to 1927 were $7,388,740 and of casualty companies insuring against the same hazard $3,529,175.

The premium rate includes such items as are necessary to cover taxes imposed upon the companies by the several states and municipalities. Consequently, all of the foreign groups of insurers who do a competitive business with appellant at the same premium rate and on the same risks and under the same conditions of risk are able to make an additional profit over and above what appellant can make, equal to that part of the premium which they collect and which they do not have to pay out as a tax under Section 30.

The Supreme Court of Illinois in its decisions in *People v. Franklin National Insurance Company*, 343 Ill. 346, and the instant case, conceded the discrimination but sustained the tax upon the theory that the classification of insurers made by the legislature was a reasonable one; in other words, that a classification of insurers that taxed fire insurance companies upon their net receipts from insurance effected against the hazards of lightning, earthquake, windstorm, cyclone, tornado, hail and other like risks and exempted foreign casualty companies from taxation upon their net receipts from similar insurance was a reasonable one. Many of the cases cited by the Supreme Court of

Illinois in its decisions sustaining the classification as reasonable, were pressed upon this Court in *Hanover Fire Insurance Company* v. *Harding, supra,* and were there held inapplicable.

This Court has many times held that a classification based upon the character of the owner of the property sought to be taxed, is unreasonable and arbitrary. Thus, in *Hanover Fire Insurance Company* v. *Harding, supra,* appellee urged upon the Court the contention that a classification into foreign and domestic fire insurers, insuring the same risks, was a reasonable one. This contention was rejected. In *Quaker City Cab Company* v. *Pennsylvania,* 277 U. S. 389, this Court held that a classification imposing a tax upon gross receipts of corporations and exempting from taxation the same kind of gross receipts in the hands of individuals engaged in the same business, was unreasonable and arbitrary. The classification in the case at bar is subject to the same vice condemned in the decisions just cited. The premium derived by foreign fire insurance companies from insuring a building against the hazard of sprinkler leakage is subject to tax; the same premium received by a foreign casualty company insuring the same building against the same hazard, is exempt from tax. The classification thus rests entirely upon the character of the entity receiving the premium. A foreign fire insurance company is taxed simply because it is a fire insurance company; a casualty company is exempt only because it is a casualty company. Such a distinction is plainly arbitrary.

Appellee says (Point 3 of motion to affirm) that to hold the discrimination here established unlawful would compel the Court to overrule a long line of prior decisions, and many cases are cited. The same argument was made and practically the same cases cited to this Court in *Hanover Fire Insurance Company* v. *Harding, supra,* and yet the Court had no difficulty in holding the discrimination arbitrary and in distinguishing the cases cited. The same situa-

tion exists in the case at bar, and the disposition of the questions presented by this record call for no reconsideration or overruling of the decisions cited by appellee.

Appellee says (Point 4 of motion to affirm) that if it is unjust discrimination to tax foreign fire companies on their net receipts while exempting foreign casualty companies from taxation on net receipts derived from insuring the same risks that it would be the act authorizing casualty companies to transact such business rather than Section 30 of the Act of 1869 which would be unconstitutional. This is not so. This Court has many times said that a taxpayer discriminated against is not required to take steps to require his competitor to pay; he may stand upon the invalidity of the arbitrary discrimination imposed upon him. *Lawrence* v. *State Tax Commission*, 286 U. S. 276. And so here. The exemption of casualty insurers from a tax on net receipts on business written in direct competition with fire companies on the same hazards renders taxes imposed upon the latter under Section 30 invalid. The section itself may not be invalid, but *so long as the state permits arbitrary discrimination in favor of casualty insurers*, so long is any tax assessed under Section 30 invalid.

Domestic fire insurance corporations are taxed upon such net income or property as remains to them as of April 1st in each tax year after the payment of all of their losses and expenses. This assessment is a property tax. Foreign fire insurance corporations, under the decision of the Supreme Court of Illinois in *National Fire Insurance Company* v. *Hanberg*, 215 Ill. 378, are forbidden to deduct their losses paid in arriving at their net receipts. The loss ratio in Cook County for the years in question was not less than forty-five per cent of the gross receipts for each of said years. Foreign fire insurance corporations pay taxes upon all property, real and personal, that they have in the state on April 1st of each year, including their cash in bank and such intangibles as are present in the

state. In addition, foreign fire corporations pay various other taxes, including salvage corps tax, fire marshal's tax, and fire department tax exacted by municipalities having fire departments (not more than 2% of their gross premiums in each of such municipalities). Domestic fire insurance companies pay no taxes, either upon their gross receipts or their net receipts, because they are taxed only upon what property or money they have left at the end of each tax year. They deduct their losses paid, which amount by stipulation to not less than forty-five per cent of each premium dollar that they receive. There is, therefore, an admitted forty-five per cent discrimination in taxation against foreign fire insurance corporations and in favor of domestic fire insurance corporations. This Court, having held in the *Hanover case*, that when foreign fire insurance corporations are admitted to do business in the state, they must then be placed upon a level with domestic fire insurance corporations as to taxation for revenue, it becomes a matter for decision whether this discrimination of forty-five per cent is an unlawful and arbitrary one. No statute in Illinois can be pointed out that makes the net receipts tax under Section 30 a commuted tax in lieu of any other form of taxation. On the contrary, counsel for appellee admit that foreign fire insurance corporations must pay taxes upon all property that they own in Illinois on April 1st of each tax year.

Invalidity of 1927 tax by reason of assessment made by Board of Review entirely on basis of estimate prepared by Herman B. Seeley who had a direct financial interest in the proceeds of taxes assessed on the basis of his estimate.

The instant action was instituted in the Circuit Court of Cook County, Illinois, to recover taxes alleged to be due for each of the tax years 1923 to 1927 inclusive, under an assessment made for all of said years at one time by the Board of Review of Cook County in the year 1928. The

Supreme Court of Illinois rejected the assessment so made as to the tax years 1923 to 1926, inclusive, but sustained it for the year 1927. The assessments were spread upon the tax books by the Board of Review of Cook County, solely upon the basis of figures prepared by one Herman B. Seeley. Seeley was not in the employ of the Board of Review of Cook County, but on the contrary had a direct interest in two or more contingent fee contracts held by two different law firms in the City of Chicago. One of these contracts in which Seeley had a one-third interest provided that the lawyers holding it should receive 33⅓% on net receipts taxes collected for years from 1869 up to 1918, and on years after that of 15%. Seeley also claimed a direct interest in another contract entered into between another law firm and the County of Cook, with reference to the collection of the same taxes. On the trial of the instant case he testified that he had already received $12,000.00 under one contract, and $4,000.00 under the other, and if recovery in the case at bar were had, he would receive a portion of the proceeds. The Board of Review of Cook County relied entirely upon the "estimate" made up by Seeley, and extended his figures on the tax books without any administrative or judicial consideration of their own. The Circuit Court of Cook County held that the action of the Board of Review in assessing the tax in question upon the basis of figures prepared for it by a tax ferret, who had a direct financial interest in the amount of taxes collected under the assessment, rendered the tax fraudulent and the tax extended thereon void.

Although the contention was pressed upon the Supreme Court of Illinois by appellant that to enforce a tax based upon such an assessment would deprive appellant of its property without due process of law, contrary to the Fourteenth Article of Amendment to the Constitution of the United States, the Court did not pass upon the question, but contented itself with mere general, and in many respects

inaccurate, statements as to the relationship of Seeley to the assessment of the tax in question. Thus the opinion of the Court refers to Seeley as an assistant corporation counsel. The record shows he was not. The Court also says in its opinion that Seeley's estimates and computations were shown to the members of the Board of Review having charge of insurance assessments, at whose directions, after being checked up and verified, they were placed upon the assessment roll, and afterwards approved by the entire board. This is an inaccurate statement. The record shows that Charles V. Barrett, the member of the Board of Review in charge of insurance assessments, directed Lauer, the chief clerk of the Board of Review, to spread Seeley's estimates on the tax books as the estimate of the net receipts of the insurance companies for the years in question. There was no checking up and verification, except by Seeley's own stenographer, who took part in the clerical work of making up the list of assessments. The record further shows that the figures prepared by Seeley were placed upon the books by the Board of Review without any consideration whatsoever by the Board. The Supreme Court further said in its opinion that no evidence was introduced by appellant to show the inaccuracy of Seeley's figures, or that the assessment made by the Board of Review was in excess of the actual net receipts. This likewise is contrary to the record. The appellant introduced evidence that for the year 1927 its actual net receipts in Cook County amounted to $76,291.00; Seeley estimated them for the same year at $121,550.00, and his estimate was placed upon the tax books by the Board of Review. In view of this uncontradicted evidence of an over-assessment of almost 50%, the statement of the Supreme Court that no evidence was introduced by appellant to show that the estimate made for the year 1927 was in excess of appellant's net receipts is palpably erroneous. In determining whether or not appellant was deprived of its property without due process of law by the assessment of the tax upon the basis of the estimate prepared by

Seeley, who had a direct financial interest in the amount of the taxes to be derived from the assessment so made, this Court will make its own examination of the facts appearing on the record.

Upon this record, the question is presented, whether a tax assessed solely upon figures prepared by one having a direct financial interest in the collection of the tax in exact proportion to the amount thereof, is valid within the guaranties afforded by the Fourteenth Article of Amendment to the Constitution of the United States. We urge and shall contend that a tax assessed and levied under such circumstances is void. The action of taxing bodies in assessing a tax is judicial in nature. *Jarman* v. *Board of Review*, 345 Ill. 248; *Allwood* v. *Cowen*, 111 Ill. 481. It is fundamental to the concept of due process of law that where judicial functions are to be exercised, all who are interested are to be excluded from taking any part therein. Thus, in *Tumey* v. *Ohio*, 273 U. S. 510; 71 L. Ed. 749, this Court reversed a judgment of the Supreme Court of Ohio, which had held proper the conviction of Tumey in a trial before the Mayor of the Village of North College Hill, Ohio, because, under the Ohio law, the Mayor had a direct financial interest in the fines imposed by him. The Court said:

> "That officers acting in a judicial or *quasi* judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule. *Dimes* v. *Grand Junction Canal*, 3 H. L. Cas. 759, 10 Eng. Reprint, 301; *Gregory* v. *Cleveland, C. & C. R. Co.*, 4 Ohio St. 675; *Pearce* v. *Atwood*, 13 Mass. 324; *Taylor* v. *Worcester County*, 105 Mass. 225; *Kentish Artillery* v. *Gardiner*, 15 R. I. 296; *Moses* v. *Julian*, 45 N. H. 52, 84 Am. Dec. 114; *State, Winans, Prosecutor* v. *Crane*, 36 N. J. L. 394; *Peninsular R. Co.* v. *Howard*, 20 Mich. 18; *Stockwell* v. *White Lake*, 22 Mich. 341; *Findley* v. *Smith*, 42 W. Va. 299, 26 S. E. 370; Nettleton's Appeal, 28 Conn. 268; Cooley, Const. Lim. 7th Ed. pp. 592, *et seq.*"

In *Dimes* v. *Grand Junction Canal*, 3 House of Lords Cases, 759, Lord Campbell said (page 793):

> "We have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

The case at bar falls within the rule laid down in the above cited cases. The uncontradicted facts disclose that the Board of Review delegated to Seeley complete charge and control over the matter of making the assessments of so-called omitted net receipts; that Seeley had an interest in contingent fee contracts entered into between certain lawyers and the taxing bodies; that the amount which Seeley was to receive through the contingent fee contracts was directly proportional to the amount of the assessment to be made; that thereupon Seeley to further his own self-interest and the interest of his contingent fee associates "estimated" the net receipts of the insurance companies for the years in question; that in making his estimate for the year 1927 he deliberately disregarded the rule of uniformity laid down by this Court in *Hanover Fire Insurance Company* v. *Harding, supra,* and did not scale and debase the net receipts as all other personal property was scaled and debased, which would have materially reduced the amount of contingent compensation; that the Board of Review adopted Seeley's figures and without any consideration of their own, directed that they be spread on the

tax books, and they were so spread, and the tax so extended.

In connection with the pecuniary incentive of Seeley to estimate the taxes at the highest possible amount, we respectfully refer this Court to the affidavit filed by the same Herman B. Seeley in this Court in *Hanover Fire Insurance Company* v. *Carr*, 272 U. S. 494, in support of the motion to advance that cause. There he swore that the foreign fire insurance companies were then (1926) indebted for taxes in the amount of $10,000,000.00, and that taxes were accruing at the rate of $2,000,000.00 per annum. Needless to say no mention was made in such affidavit of the interest of Seeley and his associates in these amounts claimed to be due. The figures so recited in the affidavit made in this Court suffice to show the high stakes for which Seeley and his associates were playing, and suggest the necessity for protecting the taxpayer against the collection of a tax based on an "estimate" made by one having a direct financial interest in the amount of the tax.

Invalidity of 1927 tax by reason of failure of Board of Review to debase estimate of appellant's net receipts as all other personal property in Cook County was debased.

Not only was the tax assessed for the year 1927 invalidated by the direct financial interest of Seeley, but the failure of the Board of Review of Cook County to scale, debase and equalize the net receipts of appellant for said year, as all other personal property was scaled, debased and equalized, as required under the repeated decisions of this Court, requires correction here. The evidence shows that during the year 1927 and for many years prior thereto, the Board of Assessors of Cook County and the Board of Review of Cook County, in determining the full value of personal property in Cook County, took 60% of the actual full, fair cash value as the full value for

assessment purposes. This was done as to all other property, but no such scaling and debasing was afforded the net receipts of the appellant after their "estimate" by Seeley. The record shows that the net receipts of the appellant were estimated by the Board of Review at $121,550.00. This estimate was not scaled and debased to 60% as all other personal property in Cook County was scaled and debased but was placed upon the tax books in the full amount of the estimate, that is, $121,550.00. The action of the Board of Review in placing upon the tax books an assessment at 100% of the net receipts of the appellant was in direct violation of the rule laid down by this Court in *Hanover Fire Insurance Company* v. *Harding, supra.* Appellee contends (Point 5 of motion to affirm) that since the appellant made no return of its net receipts as called upon to do by the Board of Review, that therefore the Board of Review was justified in making the estimate of net receipts upon the information available. This does not meet the issue presented by the tax in question. Assuming that the Board of Review was justified in making an estimate of the net receipts, still, having made the estimate, it was required to scale and debase that estimate to 60% of the amount thereof as the valuation of all other personal property in Cook County was scaled and debased for purposes of assessment. Appellee also contends (Point 4 of motion to affirm) that no proof was made by appellant of its net receipts for the year 1927. This is not so. The secretary of appellant testified that the actual net receipts of appellant in Cook County for 1927 was $76,921. The estimate made by the Board of Review was $121,550. The right of the Board of Review to make the estimate is not here in question; but having made it, they were required to scale and debase the estimate as all other personal property was scaled and debased. Appellee says (Point 6 of motion to affirm) that the record shows a debasement to 75% by the Board of Review. We have already pointed

out in our jurisdictional statement that for the year 1927 the Board of Review did not debase to 60% their estimate of net receipts but spread them at full value. However, on the basis of appellee's own admission there was a discrimination to the extent of at least 15% against appellant in 1927; a discrimination sufficient in itself to require correction by this Court like that made in *Hanover Fire Insurance Company* v. *Harding*. The discrimination against the appellant is manifest. The tax imposed under the assessment made by the Board of Review on the full 100% basis and sustained by the Supreme Court, amounted to $5,895.19. If the assessment of the Board of Review had been debased to 60% as required under the decision of this Court in *Hanover Fire Insurance Company* v. *Harding, supra,* and other decisions, of like import, the tax (by stipulation of record) would have been $3,537.10. The constitutional invalidity of the 1927 assessment alone, apart from any other questions presented by this record, calls for a review by this Honorable Court.

CONCLUSION.

We have briefly stated the various questions arising upon this record which need further argument and full consideration by this Court. They are all here for review upon this record, and regardless of ultimate disposition, we respectfully submit that their further consideration is required.

We respectfully ask that the motion to dismiss or affirm be denied.

Respectfully submitted,

FREDERICK D. SILBER,
Counsel for Appellant.

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No. 12

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IN THE

Supreme Court of the United States

October Term, A. D. 1933.

CONCORDIA FIRE INSURANCE COMPANY, a corporation,
Appellant,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal from the Supreme Court of the State of Illinois.

BRIEF FOR APPELLANT.

GEORGE WHARTON PEPPER,
WILLIAM B. BODINE,
FREDERICK D. SILBER,
HERBERT W. HIRSH,
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OFFICIAL REPORT OF OPINION DELIVERED IN THE COURT BELOW:

People of the State of Illinois v. Concordia Fire Insurance Company, 350 Ill. 365.

JURISDICTION OF THIS COURT.

Appellant having heretofore filed its printed statement as to the jurisdiction of this Court, and its brief in opposition to the motion of the appellee to dismiss or affirm, it omits from its brief herein, in accordance with Rule 27 of this Court, the statement of the grounds upon which the jurisdiction of this Court is invoked.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1933.

CONCORDIA FIRE INSURANCE COMPANY, a Corporation, *Appellant,* vs. THE PEOPLE OF THE STATE OF ILLINOIS, *Appellee.*	Appeal from the Supreme Court of the State of Illinois.

BRIEF FOR APPELLANT.

CONCISE STATEMENT OF THE CASE.

This is an appeal by the Concordia Fire Insurance Company (a Wisconsin corporation) from a judgment of the Supreme Court of Illinois rendered against it and in favor of the State of Illinois on October 22, 1932. The judgment was for $18,206.19 (with costs) which represented taxes claimed by Illinois for the year 1927, and a portion of the taxes claimed for the years 1923 to 1926, inclusive.

In 1928 Illinois brought suit in the Circuit Court of Cook County against Concordia Fire Insurance Company to recover taxes for these years under Section 30 of the Illinois Act of March 11, 1869, entitled "An Act to Incorporate and to Govern Fire, Marine and Inland Navigation Insurance Companies doing Business in the State of Illi-

nois." (Appendix p. 53.) Section 30 of the Act imposed a tax on the net receipts of foreign corporations doing such insurance business "at the same rate" as that imposed upon "other personal property."

Section 30 of the Act of 1869 had been before this Court in the case of *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494 (decided in 1926). In that case, the Supreme Court of Illinois having held that the Act imposed an occupation or privilege tax and that the foreign insurance company (Hanover) was taxable upon *all* of its local net receipts, this Court held that, so construed, the Act violated the Fourteenth Amendment to the Constitution of the United States because domestic corporations of the same class and engaged in the same kind of business were required to pay a tax on their personal property assessed only *at a reduced valuation.*

In the case at bar, on March 21, 1932, the Circuit Court, after hearing proofs and arguments, entered judgment for Concordia. Illinois appealed to the State Supreme Court.

Concordia was incorporated as a fire, marine and inland navigation insurance company, and underwrote those classes of insurance in Illinois. Under statutes permitting it to do so, it also at the dates involved in this suit was engaged in insuring against automobile hazards, explosion, sprinkler leakage and other risks. It had paid to the State of Illinois a tax for the privilege of carrying on such business in that State, and had been duly licensed to transact such business in said State.

Under the laws of Illinois, foreign unincorporated competitors of Concordia and foreign casualty companies (competing with Concordia) were not taxed under the Act of 1869, nor were they required to pay in any other form any equivalent tax. And domestic corporations competing with

Concordia were, in computing their property taxes, permitted to deduct their losses. This deduction the laws of Illinois did not permit to Concordia. Concordia's losses amounted to forty-five per cent of its net receipts.

When the appeal in the present case came before the Supreme Court of Illinois, that Court treated the tax as a property tax (instead of an occupation or privilege tax as it had theretofore held), and held that as such it was not violative of the Fourteenth Amendment. It held that the appellant was taxable not only on its net receipts from fire, marine and inland navigation business, but also from all other hazards. And it also held that Concordia must pay taxes for the year 1927 based upon 100% of its estimated net receipts—although all other forms of property were taxed on a basis of sixty per cent of full value as assessed value.

Briefly and generally, the question now before this Court is whether Section 30 of the Act of 1869, interpreted as imposing a property tax, is valid, and whether it is less unlawfully discriminatory when interpreted as a property tax than when interpreted as an occupation or privilege tax.

Assigned errors here urged.

(*a*) The Supreme Court of the State of Illinois erred in adjudicating and deciding that Section 30 of an Act of the General Assembly of the State of Illinois entitled "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved and in force March 11, 1869, as amended by an Act approved May 31, 1879, and in force July 1, 1879, was and is a good and valid enactment, and was and is not repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States.

(*b*) The Supreme Court of the State of Illinois erred in denying the claim of the appellant that said Section 30 was repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that appellant, being a corporation organized under the laws of the State of Wisconsin, and transacting the business of insurance in the State of Illinois, after having paid to said State of Illinois a tax for the privilege of carrying on its said business in Illinois, and having secured the license, permission and authority of the State of Illinois so to transact the said business of insurance, was held subject to and taxed on its net receipts derived from insurance against lightning, earthquakes, windstorms, cyclones, tornadoes, tempests, hail, frost, snow, ice, sleet, weather, flood, rain, drought, bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, explosions (other than steam boiler), sprinkler leakage, and general automobile and vehicle insurance, while casualty insurance companies organized under the laws of states other than the State of Illinois, foreign unincorporated associations, Lloyds, foreign mutuals, reciprocals and other associations of individuals, constituting foreign insurers, and doing business in the State of Illinois, in direct competition with appellant in the business of insuring against the foregoing hazards were and pay no tax or any equivalent on the net receipts derived by such other insurers from such hazards. (Rec. 159.)

(*c*) The Supreme Court of the State of Illinois erred in denying the claim of appellant that said Section 30 was repugnant to Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that appellant being a corporation organized under the laws of the State of Wisconsin, and transacting the business of insurance in the State of Illinois, and having paid the

said State of Illinois a privilege tax for such purpose, and secured permission and authority from the said state so to transact the business of insurance, was subject to a tax on its net receipts derived from said business of insurance, and was denied the right to deduct its loss payments from its gross receipts in determining the amount of its net receipts, while domestic insurance companies insuring against similar hazards were permitted to deduct the amount of their loss payments and were not required to pay a tax thereon. (Rec. 160.)

(*d*) The Supreme Court of the State of Illinois, by its final judgment and decision, denied to the appellant the equal protection of the laws in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, in that the Board of Review of Cook County in the assessment of taxes upon all other personal property for the year 1927, uniformly, systematically, and deliberately valued such property at only sixty per cent of its true, actual, full value, whereas the Board of Review in making its assessments against the net receipts of the appellant, did not take sixty per cent of the true, actual, full value thereof, but assessed said net receipts at one hundred per cent of their value instead of at sixty per cent, as all other personal property was assessed. (Rec. 161.)

(*e*) The Supreme Court of the State of Illinois erred in reversing the judgment of the Circuit Court of Cook County, and erred in entering judgment against the appellant, which said action, ruling and adjudication of the Supreme Court of the State of Illinois are in contravention of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States. (Rec. 161.)

SUMMARY OF ARGUMENT.

I.

(a) Review of prior litigation involving the validity and construction of Section 30 of the Act of 1869, and related acts.

National Fire Insurance Company v. *Hanberg*, 215 Ill. 378.

Fidelity & Casualty Company v. *Board of Review*, 264 Ill. 11.

People of the State of Illinois v. *Kent*, 300 Ill. 324.

People of the State of Illinois v. *Barrett*, 309 Ill. 53.

Hanover Fire Insurance Company v. *Carr*, 317 Ill. 366.

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494.

Hanover Fire Insurance Company v. *Harding*, 327 Ill. 590.

People of the State of Illinois v. *Franklin National Insurance Company*, 343 Ill. 336.

(b) Section 30 of the Act of 1869, construed as a property tax, is unconstitutional and void.

First National Bank v. *Maine*, 284 U. S. 312.

Farmers Loan & Trust Company v. *Minnesota*, 280 U. S. 204.

II.

(a) **Foreign casualty companies and other foreign insurers doing business in direct competition with the appellant in insuring against automobile hazards, explosion, sprinkler leakage, hail, riot, civil commotion, and other risks, are not required to pay any tax upon their net receipts, or any like tax. This creates an arbitrary discrimination against appellant, and deprives it of the equal protection of the laws, contrary to the fourteenth article of amendment to the Constitution of the United States.**

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494.

Liggett Company v. *Lee*, 288 U. S. 517.

Cumberland Coal Company v. *Board of Revision*, 284 U. S. 23.

Iowa-Des Moines National Bank v. *Bennett*, 284 U. S. 239.

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389.

Royster Guano Company v. *Virginia*, 253 U. S. 412.

(b) **If it is now discriminatory, Section 30 of the Act of 1869 can not be sustained on the ground that it was not invalid at the time of its enactment.**

Chastleton Corporation v. *Sinclair*, 264 U. S. 543.

Abie State Bank v. *Bryan*, 282 U. S. 765.

Municipal Gas Company v. *Public Service Commission*, 225 N. Y. 89.

III.

The construction placed upon Section 30 of the Act of 1869 by the Supreme Court of Illinois, denying to foreign fire insurance companies the right to deduct their loss payments from their gross receipts in determining their net receipts, when domestic fire insurance companies competing directly, are in fact allowed to deduct their losses, is repugnant to the fourteenth article of amendment to the Constitution of the United States, in that it deprives appellant of the equal protection of the laws.

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494.

Southern Railway Company v. *Greene*, 216 U. S. 400.

Cotting v. *Godard*, 183 U. S. 79.

Erie Railway Company v. *State of New Jersey*, 31 N. J. Law 542.

IV.

The estimated net receipts of appellant for the year 1927 were not debased to 60% like all other property in Cook County, for purposes of assessment. Thereby the tax extended upon the assessment so made lacked constitutional uniformity, and was void.

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494.

Cumberland Coal Company v. *Board of Revision*, 284 U. S. 23.

Iowa-Des Moines National Bank v. *Bennett*, 284 U. S. 239.

Sioux City Bridge Company v. *Dakota County, Nebraska*, 260 U. S. 441.

Raymond v. *Chicago Union Traction Company*, 207 U. S. 20.

Central Railroad Co. of New Jersey v. *Martin*, 65 Fed.(2d) 613.

ARGUMENT.

I.

(a) Review of prior litigation involving the validity and construction of Section 30 of the Act of 1869, and related acts.

It is necessary to an understanding of the questions now presented to consider the judicial history of Section 30 of the Act of 1869, and of the related statutes to which we shall refer. For convenience we have collected the relevant statutes in an appendix to our brief. Section 30 was originally a part of the Revenue Act of 1853, entitled "An Act for the assessment of property, and the collection of taxes in counties adopting township organization law." (Session Laws of Illinois, 1853, pages 3-35.) Section 30 was taken out of the Revenue Act in 1869 and incorporated into the Insurance Act of that year, where it has ever since remained. (Cahill's Illinois Revised Statutes, 1933, Ch. 73, par. 159.)

In 1869 fire, marine and inland navigation insurance companies were restricted in their underwriting in Illinois solely to insurance against fire, marine and inland navigation hazards. (Appendix, p. 52.) By subsequent amendments the hazards against which such companies might insure were enlarged in scope. The legislative changes were chronologically as follows:

1879. Insurance against lightning authorized. Laws of 1879, pages 178-179. (Appendix, p. 54.)

1881. Insurance against tornadoes authorized. Laws of 1881, page 85. (Appendix, p. 55.)

1885. Insurance against windstorms, hail storms and cyclones authorized. Laws of 1885, pages 209-210. (Appendix, p. 57.)

1905. Insurance against damage by sprinkler leakage and fire apparatus authorized. Laws of 1905, page 290. (Appendix, p. 61.)

1911-1912. Automobile, fire, theft and collision insurance authorized. Laws of 1911-1912, page 45. (Appendix, p. 62.)

1919. Scope of transportation insurance enlarged and explosion insurance authorized. Laws of 1919, page 613. (Appendix, p. 64.)

1925. General revision, whereby fire, marine and inland navigation insurance companies were again authorized to insure against all the foregoing hazards, and in addition to insure against theft of automobiles and property damage caused by automobiles. Laws of 1925, page 436. (Appendix, p. 65.)

During the entire period of amendment, Section 30 of the Act of 1869 stood unchanged, and the legislature, in enlarging the scope of the hazards against which fire, marine and inland navigation insurance companies might insure, never indicated in any manner that the net receipts derived from business other than fire, marine and inland navigation insurance were to be returned for taxation.

By the Casualty Insurance Act of April 21, 1899, (Laws of 1899, page 237, Appendix, p. 58), foreign casualty insurance companies were permitted under Section 8 of the Act to make insurances against any insurance risks specified in the articles of incorporation, which might lawfully be the subject of insurance, and the formation of corporations for insuring against which was not otherwise pro-

vided for by the statutes. In 1921, the powers of casualty insurance companies were broadened, and they were authorized to insure against any hazard resulting from the ownership, maintenance or use of any automobile or other vehicles. (Laws of 1921, pages 473-474, Appendix, p. 59.) The last mentioned statute brought foreign fire insurance companies and foreign casualty insurance companies into direct competition in the field of automobile insurance, because both casualty companies and fire companies were authorized to insure automobiles against loss by fire, theft and collision, and to indemnify the owners of automobiles against property damage to others.

In *Fidelity and Casualty Company* v. *Board of Review*, 264 Ill. 11, the Supreme Court of Illinois held that Section 30 of the Act of 1869 had no application to the net receipts of foreign casualty insurance companies authorized to do business in the State of Illinois, and held that foreign casualty insurers were not subject to taxation upon their net receipts. Foreign casualty insurance companies are not subject to any other tax on their net receipts nor to any like tax. They pay taxes only on such tangible property as they own in the county on April 1st of each year. (See, *infra*, p. 31.) Foreign fire insurance companies are likewise taxed on such tangible property.

In *National Fire Insurance Company* v. *Hanberg*, 215 Ill. 378, the Supreme Court of Illinois held that net receipts for purposes of taxation under Section 30 of the Act of 1869 meant gross receipts, less operating expenses, but not less insurance losses paid. Domestic companies are taxed under the general Revenue Act on what they have left at the end of the tax year in the way of money, or whatever their net receipts are invested in, that is, upon what remains of their gross receipts, after the deduction of all operating expenses and losses. (Cahill's Illinois Revised Statutes, 1933, Ch. 120, pars. 1-319.)

In *People* v. *Kent*, 300 Ill. 324, *People* v. *Barrett*, 309 Ill. 53, and *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, the Supreme Court of Illinois held that the tax imposed upon foreign fire insurance companies under Section 30 of the Act of 1869 was not a property tax, but was a license fee for the privilege of doing business in Illinois, and that none of the provisions of the Revenue Act was applicable to the assessment of taxes under Section 30, and that the tax assessing bodies were under a duty to assess the net receipts of foreign fire insurance companies at 100% of the amount thereof, even though, under the Revenue Act, the property of all others was scaled, debased and equalized to an amount less than the full value thereof.

In *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, the judgment of the Supreme Court of Illinois in *Hanover Fire Insurance Company* v. *Carr*, *supra*, was reversed, and the tax assessed was held to be unconstitutional and void, because of the discrimination against foreign stock fire insurance companies who were taxed upon 100% of their net receipts, after being admitted to do business in the state, while competing domestic insurance companies were taxed upon only thirty per cent of their property. This Court considered the tax imposed under Section 30 an excise or business tax. Upon the filing of the mandate of this Court in the Supreme Court of Illinois, that Court, with three of seven judges dissenting, in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, overruled its prior decisions in *People* v. *Kent*, *supra*, *People* v. *Barrett*, *supra*, and *Hanover Fire Insurance Company* v. *Carr*, *supra*, and held that Section 30 of the Insurance Act of 1869 did not impose an excise, business or occupation tax, but on the contrary imposed a property tax; that net receipts constituted personal property, and that under the Act of 1869 such net receipts should be scaled, debased and

equalized uniformly with other personal property, and the going tax rate applied. The three dissenting justices were of opinion that Section 30 of the Act of 1869 was unconstitutional and void, in view of the decision of this Court in *Hanover Fire Insurance Company* v. *Harding*, *supra*.

In *People* v. *Franklin National Insurance Company*, 343 Ill. 336, the Supreme Court held Section 30 of the Act of 1869, to be constitutional as against the challenge of unlawful discrimination in favor of foreign casualty insurance companies, unincorporated insurers, Lloyd's, and other foreign groups who were not required to pay any taxes on net receipts of their competitive business with foreign fire insurance companies, or any equivalent tax.

In the case at bar, the Supreme Court of Illinois reaffirmed the views expressed in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, and *People* v. *Franklin National Insurance Company*, 343 Ill. 336, and went further to hold that foreign fire, marine and inland navigation insurance companies were required, under Section 30 of the Act of 1869, to pay taxes, not only upon net receipts derived from insuring fire, marine and inland navigation risks, but also from all other classes of business which was written in direct competition with foreign casualty insurance companies, and other foreign insurers, none of whom was compelled, under the prior decisions of the Court, to pay any tax upon its premiums resulting from insurances effected upon the same risks. The Court did not pass upon the discrimination arising out of the refusal to permit foreign fire insurance companies to deduct their losses, while competing domestic companies were allowed to do so.

To briefly summarize the foregoing, it may be said that:

(1) Foreign fire insurance companies must return and pay taxes under Section 30 of the Act of 1869 upon every

class of business which they do, even though such additional classes were not included in the Act of 1869, and the subsequent acts authorizing the insuring of such additional hazards did not require payment of taxes under Section 30 as a condition to doing such additional business, while foreign casualty insurance companies, foreign individuals, unincorporated associations and Lloyds are exempt from the payment of any taxes upon such directly competitive business, and from any equivalent or substituted tax;

(2) Foreign fire insurance companies are not permitted to deduct insurance losses paid from gross receipts in determining net receipts for purposes of taxation under Section 30, while domestic insurance companies doing the same kind of business, are so permitted, being taxed only upon what property they have left at the end of each tax year, after paying their operating expenses and losses.

(3) Considering the tax under Section 30 a property tax, net receipts must be treated and debased to 60% like all other property.

(b) Section 30 of the Act of 1869, construed as a property tax, is unconstitutional and void.

It was insisted in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, *People* v. *Franklin National Insurance Company*, 343 Ill. 336 and by the appellant in the instant cause that Section 30 could properly be regarded only as imposing a business or occupation tax. This contention was in harmony with the view which had already been adopted by this court in *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494 when this very section was under consideration. This Court, accepting the view that the tax was a business or occupation tax, had observed that

payment of the tax was not a condition precedent to entering the State and had held that when the appellant had satisfied the conditions for doing business imposed by the State of Illinois, it might not thereafter vary the terms of the original license by enforcing a new condition involving a deprivation of Federal constitutional rights.

In the instant case the appellant reiterates the contention that the tax in question is a business or occupation tax and urges that the invalidity of the section imposing it (as applied to the appellant) is settled by the prior decision of this Court. To attempt to escape from the conclusive judgment of this court, as the court below has attempted to do, by imputing to the Legislature of Illinois, the intention to impose a tax upon the personal property of the appellant is to impute to that Legislature an intention to tax property which, for the purposes of taxation, had no situs in Illinois. The money paid by policyholders in Illinois and passing into the hands of appellant in Wisconsin, no matter what may have been the medium or method of payment, became, upon receipt, the intangible personal property of the Wisconsin corporation and as such might be taxed by Wisconsin and Wisconsin alone. Under the principles laid down in the *Farmers Loan and Trust Company* v. *Minnesota,* 280 U. S. 204, which find their latest application in *First National Bank* v. *Maine,* 284 U. S. 312, property taxes upon intangibles may be imposed only at their situs; to construe Section 30 of the Act of 1869 as imposing a property tax, in direct contravention of the construction afforded it by this Court, brings the taxes so imposed on property having its situs in Wisconsin within the prohibition of the cases referred to.

II.

(a) Foreign casualty companies and other foreign insurers doing business in direct competition with the appellant in insuring against automobile hazards, explosion, sprinkler leakage, hail, riot, civil commotion, and other risks, are not required to pay any tax upon their net receipts, or any like tax. This creates an arbitrary discrimination against appellant, and deprives it of the equal protection of the laws, contrary to the fourteenth article of amendment to the Constitution of the United States.

Originally fire, marine and inland navigation insurance companies were restricted under the Act of 1869 to insuring against those hazards. As the need developed, the legislature, from time to time by amendment to the Fire, Marine and Inland Navigation Insurance Act, permitted insurance against other hazards. Foreign casualty insurance companies were, in 1899, authorized to transact business in Illinois. Both foreign fire, marine and inland navigation insurance companies, and foreign casualty insurance companies are authorized to, and do, write in direct competition with each other, insurances against the hazards of automobile theft, fire, collision, and property damage, explosion, sprinkler leakage, tornado, hail, rain and other hazards. The existence of such competition was stipulated. (Rec. 98-99.) We have included, as an appendix to our brief (page 69), a table showing the extent to which foreign fire, marine and inland navigation insurance companies, were, during the years in question, in direct competition with foreign casualty companies in writing some of the risks mentioned.

In *Fidelity and Casualty Company* v. *Board of Review,* 264 Ill. 11, the Supreme Court of Illinois held that foreign casualty insurance companies were not required under Section 30 of the Act of 1869 to pay a tax upon their net receipts. Foreign casualty companies, Lloyds and unincorporated associations pay a tax of 2% on their gross premiums under the Privilege Tax Act of 1919 (Cahill's Illinois Revised Statutes, 1933, Chapter 73, Paragraph 79), for the privilege of transacting business in Illinois. *Foreign fire insurance companies likewise pay this tax.* There is no other tax imposed upon foreign casualty insurers, and since the decision in *Fidelity and Casualty Company* v. *Board of Review,* 264 Ill. 11, they have never paid any tax upon their net receipts, nor have they ever been subjected to any equivalent tax of any kind.

The discrimination approved by the Supreme Court of Illinois violates the rule of uniformity laid down by this Court in *Hanover Fire Insurance Company* v. *Harding,* 272 U. S. 494. The Supreme Court of Illinois admitted the discrimination, but sustained the taxes upon the following grounds:

1. That the basis of classification between foreign fire insurance companies and foreign casualty insurers was a reasonable one, and that therefore different burdens might be imposed upon the respective classes. (*People* v. *Franklin National Insurance Company,* 343 Ill. 336, at pages 342-345).

2. That if Section 30 of the Act of 1869 was valid when passed, it could not be rendered invalid by any subsequent act of legislature (such as the Casualty Insurance Act), nor by any subsequent construction placed upon it. (*People* v. *Franklin National Fire Insurance Company,* 343 Ill. 336, at page 345; *Hanover Fire Insurance Company* v. *Harding,* 327 Ill. 590, at page 600.)

The Supreme Court of Illinois held, in the case at bar, solely on the basis of an observation made in passing in the opinon of this Court in *Hanover Fire Insurance Company* v. *Harding, supra,* that foreign fire insurance companies must pay taxes on net receipts derived not only from fire, marine and inland navigation company business, but also from insuring against all other hazards. The question was not before this Court for consideration and was not argued and the observation in question was not necessary to a decision of the cause. However, the Supreme Court of Illinois treated it as precluding any further consideration of the construction in that regard to be placed upon Section 30. The result is that foreign fire insurance companies must now pay taxes upon net receipts derived from tornado, theft, explosion, sprinkler leakage, property and automobile insurance, whereas foreign casualty companies and other foreign insurers, under the rule laid down in *Fidelity and Casualty Company* v. *Board of Review, supra,* are exempt from payment upon net receipts derived from the same business. If the Supreme Court of Illinois had construed Section 30 to exclude from the receipts taxable thereunder, those derived from risks other than fire, marine and inland navigation insurance, or had held that foreign casualty insurers were taxable upon their net receipts derived from such business, there would be no discrimination in that instance. The Court adopted neither of these constructions. A foreign fire insurance company must pay on its net receipts from insuring such hazards simply because it is a fire insurance company. A casualty insurance company is exempt simply because it is a casualty insurance company. Thus, the premium derived by a foreign fire insurance company from insuring a building against the hazard of sprinkler leakage is subject to tax; the same premium received by a foreign casualty insurance company,

insuring the same building against the same hazard at the same rate is exempt from tax.

The classification sustained by the Supreme Court rests entirely upon the character of the entity receiving the premium. This Court has many times held that a classification based solely upon the character of the owner of the property sought to be taxed, is unreasonable and arbitrary. Thus, in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, it was contended in this court by the People that a classification into foreign and domestic fire insurers was a reasonable one. This contention was rejected. The Court said (page 515):

> "By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the 14th Amendment."

It will be noted that in the opinion of the Court it was expressly stated that foreign insurance companies, once admitted, were to be put on a level with all other insurance companies of the same kind, either domestic *or foreign.*

In *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, this Court said, in striking down a statute of the State of Pennsylvania, imposing a tax upon corporations operating taxicabs, from which individuals and partnerships were exempted (page 400):

> "The equal protection clause extends to foreign corporations within the jurisdiction of the state and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances. *Kentucky Fi-*

nance Corp. v. *Paramount Auto Exch. Corp.*, 262 U. S. 544, 550, 67 L. ed. 1112, 1115, 43 Sup. Ct. Rep. 636. The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation.' *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 493, 71 L. ed. 1165, 1167, 47 Sup. Ct. Rep. 678. * * *

"In effect Sec. 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. *The character of the owner is the sole fact on which the distinction and discrimination are made to depend.* The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. *Power Mfg. Co.* v. *Saunders, supra.* No decision of this court gives support to such a classification. 'In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the 14th Amendment. See *Railroad Tax case*, 8 Sawy. 238, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co.*, 9 Sawy. 165, 18 Fed. 385; *Northern P. R. Co.* v. *Walker*, (C. C.) 47 Fed. 681. The tax cannot be sustained." (Italics ours.)

The case at bar falls squarely within the rule laid down in *Quaker City Cab Co.* v. *Pennsylvania, supra.* The distinction between foreign casualty insurers and foreign fire in-

surers rests solely upon the fact that one is a fire insurance company, while the other is a casualty insurance company. This distinction is illusory and unsubstantial, for as we have pointed out, they insure the same classes of risks under the same conditions, and in direct competition with each other.

The Supreme Court of Illinois, in *People* v. *Franklin National Insurance Company*, 343 Ill. 336, in seeking to distinguish *Quaker City Cab Company* v. *Pennsylvania*, *supra*, said (pages 343-344):

> "In support of its position the defendant relies largely upon a decision of the United States Supreme Court in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, where a statute taxing the receipts of the taxicab business when transacted by a foreign corporation was held unconstitutional because it failed to tax the same character of receipts in the hands of individuals or foreign unincorporated associations. But there are essential differences between that case and the case at bar. The question in the case cited was not one of alleged discrimination between a foreign corporation and a domestic corporation or between one foreign corporation and another foreign corporation, but was one of alleged discrimination between both foreign and domestic corporations on one side and individuals on the other side. The court did not hold the law invalid as to the foreign taxicab company, only, but held it invalid as to the domestic as well as to the foreign company. The laws of Pennsylvania taxed individuals only on their taxicabs and their other property in Pennsylvania. It did not impose upon them any equivalent for the tax imposed upon the gross receipts of the domestic and foreign taxicab companies. There was therefore manifest inequality between the corporations, both domestic and foreign, on the one side and individuals on the other side."

The distinction sought to be made that the discrimination in the *Quaker City Cab case* was in favor of individuals and against corporations, whether foreign or domestic, transacting the same business is without substance. Section 30 imposes a tax upon the net receipts of a foreign fire insurance company, and does not impose the same tax or any like tax upon the net receipts of a foreign casualty company or foreign unincorporated association, transacting the same business under the same conditions, resulting in an inequality as manifest as that between domestic and foreign taxicab corporations on one side, and individual taxicab operators on the other. The point in the *Quaker City Cab Company case* which the Supreme Court of Illinois failed to appreciate was that discrimination for purposes of taxation cannot be made to rest solely upon "the character of the operator." In the *Quaker City Cab case* it was corporations on one side and individuals on the other; in the instant case it is foreign fire insurance companies on one side and foreign individuals and foreign casualty insurance companies on the other. The principle involved is exactly the same.

In *Cumberland Coal Company* v. *Board of Revision*, 284 U. S. 23, this Court struck down a method of assessment of coal lands, under which virgin coal as distinguished from active coal, was assessed upon a different basis. The Court said (page 28):

> "It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes the constitutional right of one taxed upon the full value of his property. *Sunday Lake Iron Co.* v. *Wakefield Twp.*, 247 U. S. 350, 62 L. ed. 1154, 38 S. Ct. 495, *supra*; *Sioux City Brdge. Co.* v. *Dakota County*, 260 U. S. 441, 67 L. ed. 340, 28 A. L. R. 979, 43 S. Ct. 190, *supra*; *Raymond* v. *Chicago Union Traction Co.*,

207 U. S. 20, 52 L. ed. 78, 28 S. Ct. 7, 12 Ann. Cas. 757, *supra; Chicago G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 69 L. ed. 183, 45 S. Ct. 55, *supra*. In *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. at p. 446, 67 L. ed. 343, 28 A. L. R. 979, 43 S. Ct. 190, *supra*, this Court, referring to the dilemma presented by a case where one or a few of a class of taxpayers are assessed at one hundred per cent. of the value of their property pursuant to statutory requirement and the rest of the class are intentionally assessed at a lower percentage, stated the rule to be as follows: 'This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law.'

"In applying this principle, the fact that a uniform percentage of assigned values is used, cannot be regarded as important if, in assigning the values to which the percentage is applied, a system is deliberately adopted which ignores differences in actual values so that property in the same class as that of the complaining taxpayer is valued at the same figure (according to the unit of valuation, as for example, an acre) as the property of other owners which has an actual value admittedly higher. Applying the same ratio to the same assigned values, when the actual values differ, creates the same disparity in effect as applying a different ratio to actual values when the latter are the same. If the Commissioners, in the instant case, had taken the basis of one hundred per cent. instead of fifty per cent. of the assigned values but had adopted the same method of assessment by which all the coal in a township (aside from active coal) was assessed at

the same value an acre, despite well known and important differences in value, the result would have been an undervaluation of similar coal belonging to other owners, which would have brought the case of the petitioners within the principle of the decisions cited. In such case, if the petitioners' property had been valued at one hundred per cent. of its actual value, the like property of the other owners, having a higher actual value, would in effect have been valued at less than one hundred per cent. The discrimination is essentially the same, and is equally repugnant to constitutional right, when both assessments are made on the basis of fifty per cent. of assigned values and differences in actual values are deliberately and systematically disregarded. The undervalued property is in effect valued at less than fifty per cent. of its actual value; for example, coal of the same description worth twice as much as that of the Cumberland Coal Company was really valued at twenty-five per cent. of its actual value.

"The petitioners are entitled to a readjustment of the assessments of their coal so as to put these assessments upon a basis of equality, with due regard to differences in actual value, with other assessments of the coal of the same class within the tax district."

In *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, this Court held invalid assessments made upon shares of stock in a national bank at a higher rate than the shares of stock in competing domestic corporations were assessed.

In *Liggett Company* v. *Lee*, 288 U. S. 517, this Court in striking down an arbitrary classification, said (page 533):

"The statute lays a tax of a stated sum per store on any given number of stores in the same ownership located within the same county; but if one happens to be in a county other than that in which the remainder are situate, imposes an increased tax not only on the single

one lying in the second county, but on all. Thus if an owner has fourteen stores he may add a fifteenth in the same county and the only additional tax will be in the amount of $10 attributable to the privilege of conducting the new store. But if the new store happens to be in another county the license fee for it will be increased to $15, and that for each of the other fourteen, which have long since been opened and operated in the original county, will be increased from $10 to $15.

"We are unable to discover any reasonable basis for this classification. As we have held, gradation of the tax according to the number of units operated cannot be said to be so unreasonable as to transcend the constitutional powers of the legislature. The addition of a store to an existing chain is a privilege, and an increase of the tax on all the stores for the privilege of expanding the chain cannot be condemned as arbitrary; but an increase in the levy not only on a new store, but on all the old stores, consequent upon the mere physical fact that the new one lies a few feet over a county line, finds no foundation in reason or in any fact of business experience. There is no more reason for adopting the county line as a measure of the tax than there would be for taking ward lines in cities, or arbitrary lines drawn through the state regardless of county boundaries. It is suggested that the license fee for extending operations into a great and populous city, or for doing business upon crowded business streets, should be greater than for the same privilege in a village or a sparsely settled suburb. But the adoption of a county line can have no reference either to density of population, congregation of the buying public, or any other factor bearing upon the choice of a business site."

The case chiefly relied upon by the Supreme Court of Illinois to sustain the classification between foreign fire insurers and foreign casualty insurers was *Florida Cen-*

tral and Peninsular Railway Co. v. *Reynolds*, 183 U. S. 471. In that case, this Court sustained a statute of the State of Florida which required an assessment of omitted taxes upon the property of railroads which had escaped taxation in prior years, without at the same time requiring such assessments upon other property. As this Court pointed out in its opinion (page 480), the fact that railroads as a class might have escaped the payment of taxes for which they were liable justified special measures to enforce their assessment and collection, which the Florida legislature deemed not necessary as to other property. No such question inheres in the case at bar; the discrimination here is between members of the same class, that is, between insurance companies writing the same risks under the same conditions in direct competition with each other.

The classification sustained by the Supreme Court of Illinois does not rest upon differences in the hazards undertaken, the premiums received or upon any other attribute of the business alone. There is no relation between the existence or non-existence of the charter power to write fire insurance warranting the taxation of premiums on automobile, sprinkler leakage, explosion, hail and tornado insurance when written by a fire company, and exempting the same receipts from tax when the same risks are insured against by a casualty insurance company.

(b) If it is now discriminatory, Section 30 of the Act of 1869 cannot be sustained on the ground that it was not invalid at the time of its enactment.

One of the grounds assigned by the Supreme Court of Illinois for sustaining the tax upon the net receipts of foreign fire insurance companies, whereas no such tax was imposed upon the net receipts of foreign casualty insurance companies, was that Section 30 of the Act of 1869, if consti-

tutional when passed, could not be rendered unconstitutional by subsequent legislation or judicial decision. The position so taken by the Court is untenable; the principle that an act though valid when passed may become invalid by reason of subsequent developments, is stated by the Chief Justice in his opinion in *Abie State Bank* v. *Bryan*, 282 U. S. 765, as follows (page 772):

> "As to the first objection, it is sufficient to say that the Bank Guaranty Law was sustained by this court as a police regulation (*Shallenberger* v. *First State Bank, supra; Noble State Bank* v. *Haskell*, 219 U. S. 104, 575, 55 L. ed. 112, 341, 32 L. R. A. (N. S.) 1062, 1065, 31 S. Ct. 186, 299, Ann. Cas. 1912A, 487, 489), and that a police regulation, although valid when made may become, by reason of latter events, arbitrary and confiscatory in operation (*Smith* v. *Illinois Bell Teleph. Co.*, 282 U. S. 133, 162, *ante*, 255, 270, 51 S. Ct. 65; *Allen* v. *St. Louis, I. M. & S. R. Co.*, 230 U. S. 553, 555, 556, 57 L. ed. 1625, 1627, 1628, 33 S. Ct. 1030; *Lincoln Gas & E. L. Co.* v. *Lincoln*, 250 U. S. 256, 268, 63 L. ed. 968, 976, 39 S. Ct. 454). In the *Shallenberger Case*, the suit was brought immediately upon the enactment of the law, and that decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing the validity of assessments in the light of the later actual experience."

And in *Chastleton Corporation* v. *Sinclair*, 264 U. S. 543, Mr. Justice Holmes said (page 547):

> "A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change, even though valid when passed."

And in *Municipal Gas Company* v. *Public Service Commission*, 225 N. Y. 89, the Court in rejecting the argument that a statute is either valid or invalid when passed, and

might not become so by reason of changed conditions, said (pages 95-96):

"But the argument is that a statute is either valid or invalid at the moment of its making, and from that premise the conclusion is supposed to follow that there is a remedy for present confiscation, but none for confiscation that results from changed conditions. We do not view so narrowly the great immunities of the Constitution, or our own power to enforce them. A statute prescribing rates is one of continuing operation. It is an attempt by the legislature to predict for future years the charges that will yield a fair return. The prediction must square with the facts, or be cast aside as worthless (*Ex parte Young*, 209 U. S. 123, 147, 148). It must square with them in one year as in another, at the beginning but equally at the end. In all such legislation, from the hour of its enactment, there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophecy; the coming years must tell whether the prophecy is true or false. All that we can say at the outset is that the power to regulate exists. The validity of its exercise depends upon the nicety of the adjustment between forecast and events. This is as true of a regulation which looks forward a year as of one which looks forward a decade or a century. In either case, with differences only of degree, there is a forecast of the future, which must be justified by results. Into every statute of this kind, we are to read, therefore, an implied condition. The condition is that the rates shall remain in force at such times and at such only as their enforcement will not work denial of the right to a fair return. When the return falls below that level, the regulation is suspended. When the level is again attained, the duty of obedience revives. There would be no obscurity about this if the condition were expressed. It is no less binding because it is implied. The Constitution is the supreme law; and statutes are written and enforced in submission to its commands."

The interpretation given Section 30 by the Supreme Court of Illinois, requiring foreign fire insurance companies to pay a tax upon their net receipts derived from all classes of business, and exempting foreign casualty insurance companies from any like tax, results in the imposition of invalid assessments upon foreign fire insurance companies. The appellant and other foreign fire insurers were not required to attempt to bring about the imposition of assessments against net receipts of foreign casualty insurance companies and other foreign insurers. They were entitled to stand upon the invalidity of the arbitrary discrimination practiced against them.

Lawrence v. *State Tax Commission*, 286 U. S. 276.
Iowa-Des Moines National Bank v. *Bennett*, 284 U. S. 239.
Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23.
Greene v. *Louisville & Interurban Railway Co.*, 244 U. S. 499.

III.

The construction placed upon Section 30 of the Act of 1869 by the Supreme Court of Illinois, denying to foreign fire insurance companies the right to deduct their loss payments from gross receipts in determining their net receipts, when domestic fire insurance companies competing directly, are in fact allowed to deduct their losses, is repugnant to the fourteenth article of amendment to the Constitution of the United States, in that it deprives appellant of the equal protection of the laws.

Section 30 of the Act of 1869 imposes a tax upon the net receipts of foreign fire, marine and inland navigation insurance companies, doing business in Illinois. The Act itself does not define the meaning of the term "net re-

ceipts." In *National Fire Insurance Company* v. *Hanberg*, 215 Ill. 378, the Supreme Court of Illinois held that the term "net receipts" meant gross receipts, less operating expenses, but not less losses paid. (But in *People ex rel.* v. *Fayart*, decided by the Supreme Court of Illinois in 1928, and explained by counsel for appellee (Rec. 5, 6) that Court held Section 30 imposed a net income or net profits tax, and that it was unconstitutional under the principles of *Quaker City Cab Co.* v. *Pennsylvania, supra*). The loss ratio of the appellant during the tax years 1923 to 1927 was not less than forty-five per cent of the gross premiums per year received by it in Cook County (Rec. p. 107).

Domestic insurance companies pay a tax upon real and personal property owned by them on April 1st of each tax year (Cahill's Illinois Revised Statutes, 1933, Ch. 120, pars. 1, 319). Domestic companies in direct competition with foreign fire insurers in Illinois (Rec. 99) are not subject to any tax upon their net receipts and are taxed only upon such property as they have left at the end of the tax year, necessarily after the payment of their operating expenses *and losses*.

The construction of Section 30 of the Act of 1869 prohibiting foreign fire insurers from deducting their losses, while domestic fire insurers in direct competition with them are in effect permitted such reduction, results in a heavy discrimination in favor of domestic insurers, contrary to the rule laid down in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494. It was there settled by this Court that the tax imposed upon foreign fire, marine and inland navigation insurance companies under Section 30 of the Act of 1869, is not a license fee or tax payable by foreign insurers for the privilege of carrying on business in the State of Illinois, and that foreign fire, marine and inland navigation insurance companies, having been admitted to do business in the State of Illinois, are to be placed under

the same, but no greater, burden of taxation than domestic fire insurance companies. The Court said (page 516):

> "We thus reach the question whether a tax imposed upon foreign fire, marine and inland navigation insurance companies on the net receipts of all their business, whether fire, marine, inland navigation or other risks, is a denial of the equal protection of the laws when domestic insurance companies pay no taxes on such net receipts. Under the previous decisions of the supreme court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the state, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the state authorities and the foreign insurance companies in such a construction of Sec. 30 and in the practice under it. But an occupation tax imposed upon 100 per cent of the net receipts of foreign insurance companies admitted to do business in Illinois is a heavy discrimination in favor of domestic insurance companies of the same class and in the same business which pay only a tax on the assessment of personal property at a valuation reduced to one-half of 60 per cent of the full value of that property. It is a denial of the equal protection of the laws."

In *Southern Railway Company* v. *Greene*, 216 U. S. 400, the Court, in holding unconstitutional a so-called franchise tax, levied upon foreign corporations, from which domestic companies were exempted, said:

> "We hold, therefore, that to tax the foreign corporation for carrying on business under the circumstances

shown, by a different and much more onerous rule than is used in taxing domestic corporations for the same privilege, is a denial of the equal protection of the laws, and the plaintiff being in position to invoke the protection of the 14th Amendment, that such attempted taxation under a statute of the state does violence to the Federal Constitution."

And in *Erie Railway Co.* v. *State of New Jersey*, 31 N. J. Law 542, the Court said, in an opinion approved by this Court in *Hanover Fire Insurance Company* v. *Harding*, *supra*, (pages 542-544):

"Considering the question in a theoretical point of view, it would seem to be clear that a state can not tax, for the purpose of revenue, a foreign corporation in a mode different in principle from that in which she can tax one of her own domestic corporations. It is not denied that the corporate existence of a company is recognized, not by right, but of grace in foreign jurisdictions, nor that each government has the competence to refuse to recognize such existence except on its own conditions. The principle is universally acknowledged. Hence laws requiring insurance companies * * * to file bonds and submit to other exactions as a prerequisite to their admission in an incorporated capacity into the state. Such laws, when rightfully made, are evidently mere police regulations, designed to protect the citizens of the state in which they are enacted from loss or imposition, and on this ground their legality can not be drawn into question. But a tax-law, having revenue for its object, is based upon a principle entirely different. The right to tax for revenue is the right of the government to take so much of the property of the person or the company upon whom the tax falls as such government may deem necessary for its public wants. The act of taking the property, therefore, must of necessity be an acknowledgment of the legal status of the person or company whose property is taken. To assert that a company whose property is thus taken, has no rights but such as the government taking it chooses to confer, is to

assert that such company has no title to its property but such as may be conceded to it by the taking power.

"It seems to be utterly inconsistent with legal principles, which have always been deemed axiomatic, to hold that a government can recognize the legal existence of a foreign corporation for the purpose of taxation, and at the same time can deny such legal existence, for the purpose of depriving it of those rights which belong to every individual or company known to the law. Such a doctrine would obviously offer the entire property of a foreign corporation as a prize to the rapacity of any state in whose territories it might be. It is readily to be conceded that a law imposing certain terms upon all foreign corporations, as conditions precedent to their acquisition in this state of the right to act in the unity of their corporate existence would be legal. Such law would prevent foreign persons from doing any legal act in this state as a corporation, but can it be maintained that such law would have the further effect of leaving the property of the company as the spoil of the first taker. * * * If a state, under a tax law, can require a foreign corporation to pay any sums it may please and then may defend itself against the alleged unconstitutionality of such act on the plea that the company taxed has no right but such as of grace may be conferred upon it, no reason is perceived why the general government could not at its pleasure seize the property of all corporations in this country on the ground that incorporated companies have no rights which the law is bound to respect of which are recognized by the Constitution of the United States. A principle involving such results is not admissible."

In *People* v. *Kent, supra, People* v. *Barrett, supra,* and *Hanover Fire Insurance Company* v. *Carr, supra,* the Supreme Court of Illinois construed the tax imposed under Section 30 of the Act of 1869 as a tax imposed upon foreign fire insurance companies for the privilege of carrying on

their business in the State of Illinois, and held that, so considered, the tax was not subject to the incidents of property taxation, as, for example, scaling, debasing and equalizing. This Court held in *Hanover Fire Insurance Company* v. *Harding, supra,* that this was an unconstitutional discrimination in favor of domestic companies who paid on their personal property at a valuation reduced to one-half of the sixty per cent of the full value of their property, whereas foreign insurance companies were taxed upon one hundred per cent of their net receipts. This Court assumed on the basis of the record then before it that if the net receipts of foreign fire insurance companies were scaled, debased and equalized like property in the hands of domestic companies, the resultant tax might not be violative of the Fourteenth Article of Amendment to the Constitution of the United States. This Court did not have before it in the *Hanover case* the narrower question of discrimination arising out of the meaning which had therefore been given the term "net receipts" by the Supreme Court of Illinois. If the Supreme Court of Illinois had construed the term "net receipts" to mean gross receipts, less operating expenses and losses, there would be no discrimination between foreign and domestic companies, but the Supreme Court of Illinois construed the term "net receipts" to mean gross receipts less operating expenses, but not less losses, and herein lies the discrimination which this Court did not have before it in determining the broader questions presented by the record in *Hanover Fire Insurance Company* v. *Harding, supra.*

Under the scheme of taxation of insurance companies in Illinois, foreign fire insurance companies, in addition to the taxes paid by them for the privilege of carrying on the business of insurance in Illinois, are required to pay a tax upon their net receipts, construed by the Supreme Court

as gross receipts less operating expenses, but not less loss payments. Domestic companies are not taxed upon their net receipts as such, but are taxable under the General Revenue Act upon property into which their net receipts have been converted. There remains for assessment under the General Revenue Act only what is left on April 1st of each year, after the deduction of both operating expenses and losses. The loss ratio of foreign fire insurance companies, operating in Cook County, was stipulated to be not less than forty-five per cent of their gross premiums each year from 1923 to 1927, inclusive. (Rec. 107.) The discrimination resulting from the refusal to permit foreign fire insurance companies to deduct their losses may be illustrated by the following table:

Foreign Fire Ins. Co.	Domestic Fire Ins. Co.
GROSS RECEIPTS.	
$1,000,000.00	$1,000,000.00
EXPENSES.	
300,000.00	300,000.00
LOSSES.	
450,000.00 (But not permitted to be deducted under *National Fire Insurance Company* v. *Hanberg, supra.*)	450,000.00
NET RECEIPTS, SUBJECT TO TAX.	
$700,000.00	$250,000.00

The foregoing comparative table illustrates the heavy discrimination to which foreign fire insurance companies are subjected. It was stipulated that domestic companies were not subjected to any tax upon their net receipts, and were assessed upon their other property like other taxpayers. (Rec. 99.) Foreign fire, marine and inland navigation in-

surance companies, in addition to the tax under Section 30, paid a tax for the privilege of doing business in Illinois, and also paid taxes upon all their tangible property in Illinois. Domestic fire insurance companies are subjected to no tax of any kind imposing a burden upon them equal to the burden of the tax in effect imposed upon the amount of the losses paid by foreign companies.

The unconstitutionality of the discrimination complained of was raised in the Circuit Court of Cook County and pressed upon the Supreme Court of Illinois, but was disposed of by that Court with the general statement that the constitutional questions involved had been determined by the prior opinions in *Hanover Fire Insurance Company* v. *Harding, supra,* and *People* v. *Franklin National Insurance Company, supra.* In neither of the cases referred to was the point now under consideration discussed by the Court.

The discrimination arising out of the taxation of foreign fire insurance companies upon their net receipts, without permitting them to deduct their losses, cannot be sustained under the rule laid down in *Hanover Fire Insurance Company* v. *Harding,* 272 U. S. 494. In order to accomplish the substantial equality spoken of in *Hanover Fire Insurance Company* v. *Harding, supra,* the Supreme Court of Illinois must be required to recede from the position taken in *National Fire Insurance Company* v. *Hanberg, supra,* just as, in an attempt to meet the objections pointed out in *Hanover Fire Insurance Company* v. *Harding,* 272 U. S. 494, it overruled *People* v. *Kent, supra, People* v. *Barrett, supra,* and *Hanover Fire Insurance Company* v. *Carr, supra,* in so far as they were inconsistent with the principles laid down by this Court. The taxes assessed against the net receipts of appellant, which was not permitted to deduct its losses in determining its net receipts, whereas domestic fire

insurance companies, in direct competition with it, were permitted so to do, violated the guaranty of the equal protection of the laws afforded by the Fourteenth Article of Amendment to the Constitution of the United States.

IV.

The judgment of the Supreme Court of Illinois sustaining the assessment of the Board of Review of Cook County against appellant for the tax year 1927 deprives appellant of its property without due process of law, and is a denial of the equal protection of the laws.

All the constitutional objections to the assessments made for 1923 to 1926, inclusive, apply equally to the tax assessed by the Board of Review for 1927, but there are additional questions affecting the validity of the 1927 tax. All assessments for the five years in question were made at one time by the Board of Review in 1928. They followed the serving of notices by the Board of Review upon appellant and other foreign companies in November, 1927, requiring such companies to file new returns of net receipts from the year 1869 to and including 1927 (Rec. p. 120). This, in spite of the fact that by stipulation it appears from the record that appellant and the other companies in interest had filed sworn annual returns with the Board of Assessors and Board of Review for each of the years in question, and that assessments had been made for each such years. (Rec. 105.) Nevertheless, the Board of Review disregarding that fact, made new assessments for the same years in 1928. It appears by stipulation that appellant and other companies interested did not even know of the making of such new assessments until they were served with summons in actions of debt to collect the amount of such taxes (Rec. 107).

It appears further that for each of said tax years in question not less than two, and in some cases three, independent assessments of the same net receipts had been made by the Board of Assessors and the Board of Review, in some cases treating the net receipts under the head of "Credits," in other cases under the head of "Personal property" and in still other cases under the head of "Net Receipts" or "Omitted Net Receipts" (Rec. 11, 105).

The Supreme Court of Illinois, in the second *Hanover* decision, 327 Ill. 590, required that the assessing authorities in Illinois treat net receipts in all respects like other personal property. In 1927, the full fair cash value of all other taxable property was taken at sixty per cent of such full value for assessment purposes. (Rec. 9, 19.) Such debasement to sixty per cent has been a recognized rule of valuation in Illinois for so many years that both the State Tax Commission and the Supreme Court of Illinois have required it. In the early case of *Board of Supervisors of Bureau County* v. *Chicago, Burlington & Quincy R. R. Company*, 44 Ill. 229, the rule as to debasement was announced as follows (page 239):

> "The rule adopted by the assessors in this State has grown into a custom, and has been tacitly sanctioned by every department of the government for a long course of years, and it is now too late to challenge it. * * *
>
> "It is an admitted fact on both sides to this controversy, that the property of no one owner in the county of Bureau has been taxed on its real value, and that the per cent added by the board of supervisors to the valuation of the property of appellees imposes on them a greater proportionate burden than the law requires them to bear. We are of this opinion, and therefore consider the action of the board unfounded in justice, and in direct opposition to the Constitution. The great and attractive feature of uniformity has been disregarded by the board, and appellees victimized."

In *People* v. *Board of Review*, 326 Ill. 124, it was said (pages 138-139):

> "This court quoted from the annual report of the Illinois Tax Commission in *People* v. *Stewart*, 315 Ill. 25, 'It is to be remembered that under the law, in each instance, every piece and part and parcel of property, whether real or personal, including moneys and credits, should be taken at its full, fair cash market value by the assessing authorities, and by reason of custom and such general use as to become a rule which every taxpayer is entitled to the benefit of, sixty per cent of such full value thus determined should be taken for the full equalized value to which the tax rate will be applied.' It thus appears that from uniform practice and judicial construction assessments for taxing properties should be equalized."

This Court has repeatedly held that an assessment is unconstitutional and void where the tax assessing bodies have generally assessed other like property at a certain percentage of its fair cash, market value, but have failed so to assess the property of the complaining taxpayer. Thus, in *Sioux City Bridge Company* v. *Dakota County, Nebraska*, 260 U. S. 441, this Court reversed a judgment of the Supreme Court of Nebraska, for the reason that the property of the Sioux City Bridge Company was assessed at its full value, while all other property in the county was assessed at only 55/100ths of its full value. The Court said, speaking through Mr. Chief Justice Taft (page 445):

> "In the case of *Sunday Lake Iron Co.* v. *Wakefield Twp.*, 247 U. S. 350, 352, 353, 62 L. Ed. 1154-1156, 38 Sup. Ct. Rep. 495, this Court said:
>
> " 'The purpose of the equal protection clause of the 14th Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly

constituted agents. And it must be regarded as settled that intentional, systematic under-valuation by state officials of other taxable property in the same class contravenes the constitutional right of one taxed upon the full value of his property. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 35, 37, 52 L. Ed. 78, 87, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757. Analogous cases are *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499, 516-518, 61 L. Ed. 1280, 1289, 1290, 37 Sup. Ct. Rep. 673, Ann. Cas. 1917E, 88; *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153, 160, 25 L. Ed. 903, 905; *Taylor* v. *Louisville & N. R. Co.*, 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350, 364, 365, 372, 374; *Louisville & N. R. Co.* v. *Bosworth*, 209 Fed. 380, 452; *Washington Water Power Co.* v. *Kootenai County*, 270 Fed. 369, 374. * * *

"This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent of its true value is to have his assessment reduced to the percentage of that value at which others are taxed, even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standards of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law. In substance and effect, the decision of the Nebraska supreme court in this case upholds the violation of the 14th Amendment to the injury of the Bridge Company. We must, therefore, reverse its judgment."

In *Raymond* v. *Chicago Union Traction Company*, 207 U. S. 20, this Court, in affirming a decree, enjoined the collection of a tax based on a discriminatory assessment made by the State Board of Equalization. The Court said (pages 36-37):

"The case before us is one which the facts make exceptional. It is made entirely clear that the board

of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the state, through the board. There is here no contention of illegality simply because of assessing the franchises of these corporations at a different rate from tangible property in the state, which the state might do (*Coulter* v. *Louisville & N. R. Co.*, 196 U. S. 599, 49 L. ed. 615, 25 Sup. Ct. Rep. 342), but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations of the same class for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations. The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the Constitution of the state in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her, or its property,' was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the state. This action resulted in an illegal discriminatiton which, under these facts, was the action of the state through the board."

In the recent case of *Cumberland Coal Company* v. *Board of Revision*, 284 U. S. 23, 52 Supreme Ct. 48, this Court again fully reviewed the authorities bearing on this question, and speaking through the Chief Justice, said (pages 28-29):

"It is established that the intentional, systematic undervaluation by state officials of taxable property of the same class belonging to other owners contravenes

the constitutional right of one taxed upon the full value of his property. *Sunday Lake Iron Co.* v. *Wakefield Twp.*, 247 U. S. 350, 62 L. Ed. 1154, 38 S. Ct. 495, *supra*; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 67 L. ed. 340, 28 A. L. R. 979, 43 S. Ct. 190, *supra*; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 52 L. ed. 78, 28 S. Ct. 7, 12 Ann. Cas. 757, *supra*; *Chicago G. W. R. Co.* v. *Kendall*, 266 U. S. 94, 69 L. ed. 183, 45 S. Ct. 55, *supra*. In *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. at p. 446, 67 L. ed. 343, 28 A. L. R. 979, 43 S. Ct. 190, *supra*, this Court referring to the dilemma presented by a case where one or a few of a class of taxpayers are assessed at one hundred per cent. of the value of their property pursuant to statutory requirement and the rest of the class are intentionally assessed at a lower percentage, stated the rule to be as follows: 'This Court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed even though this is a departure from the requirement of statute. The conclusion is based on the principle that where it is impossible to secure both the standard of the true value, and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law'."

And in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, the Court said, speaking through Mr. Justice Brandeis (pages 245-246):

"Both petitioners claim that they have been subjected to intentional, systematic discrimination in violation of the equal protection clause of the 14th Amendment. The federal right of the Central State Bank rests wholly upon that clause. It is assumed that there was such inequality of treatment as the Constitution prohibits. *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 37, 52 L. ed. 78, 82, 28 S. Ct.

7, 12 Ann. Cas. 737; *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 441, 446, 67 L. ed. 340, 343, 28 A. L. R. 979, 43 S. Ct. 190; *Cumberland Coal Co.* v. *Board of Revision*, Nos. 7-13, October Term, 1931, decided November 23, 1931 (284 U. S. 23, *ante*, 146, 52 S. Ct. 48). Compare *Sunday Lake Iron Co.* v. *Wakefield Twp.*, 247 U. S. 350, 353, 62 L. ed. 1154, 1156, 38 S. Ct. 495. But the Iowa court, without denying the lack of power of the State to authorize the discrimination effected, holds that such discrimination does not violate the federal Constitution because it resulted from the act of private individuals and not of the State. The prohibition of the 14th Amendment, it is true, has reference exclusively to action by the State, as distinguished from action by private individuals. *Virginia* v. *Rives*, 100 U. S. 313, 318, 25 L. ed. 667, 669, 3 Am. Crim. Rep. 524; *United States* v. *Harris*, 106 U. S. 629, 639, 27 L. ed. 290, 294, 1 S. Ct. 601. But acts done 'by virtue of a public position under a State Government * * * and in the name and for the State,' *Ex parte Virginia*, 100 U. S. 339, 347, 25 L. ed. 676, 679, 3 Am. Crim. Rep. 547, are not to be treated as if they were the acts of private individuals, although in doing them the official acted contrary to an express command of the state law. When a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of the state law."

In *Central Railroad Company of New Jersey* v. *Martin*, 65 Fed.(2d) 613, the Circuit Court of Appeals for the Third Circuit, in awarding an injunction against the assessment of a tax on the basis of a 100% valuation of the complainant's property, whereas all other property was assessed at 65% of its value, said (page 614):

"Such violation existing, the right is to have the discriminatory assessment of 100 per cent. reduced to

the 65 per cent. level of other taxpayers, or, as the Supreme Court, citing *Taylor* v. *Louisville & N. R. Co.*, (C. C. A.) 88 F. 350, and *Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88, held in *Sioux City Bridge Co.* v. *Dakota County*, 260 U. S. 446, 43 S. Ct. 190, 192, 67 L. Ed. 340, 28 A. L. R. 979: 'This court holds that the right of the taxpayer whose property alone is taxed at 100 per cent. of its true value is to have his assessment reduced to the percentage of that value at which others are taxed.' Later on it was held in *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U. S. 239, 52 S. Ct. 133, 136, 76 L. Ed. 265: 'The right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced. But it is well settled that a taxpayer who has been subjected to discriminatory taxation through the favoring of others in violation of federal law cannot be required himself to assume the burden of seeking an increase of the taxes which the others should have paid. *Cumberland Coal Co.* v. *Board of Revision*, (284 U. S. 23, 52 S. Ct. 48, 76 L. Ed. 146), *supra; Greene* v. *Louisville & I. R. Co.*, 244 U. S. 499, 514-518, 37 S. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; *Chicago Great Western Ry. Co.* v. *Kendall*, 266 U. S. 94, 96, 98, 45 S. Ct. 55, 69 L. Ed. 183; *Sioux City Bridge Co.* v. *Dakota County*, (260 U. S. 441, 43 S. Ct. 190, 67 L. Ed. 340, 28 A. L. R. 979), *supra*. Nor may he be remitted to the necessity of awaiting such action by the state officials upon their own initiative. *Montana National Bank* v. *Yellowstone County*, (276 U. S. 499, 48 S. Ct. 331, 72 L. Ed. 673), *supra*.' "

The method of making the 1927 assessment in 1928 was the following: The Board of Review took the gross receipts returned, and instead of deducting the actual operating expenses shown under oath by appellant's return (in the case of appellant fifty-four per cent of gross receipts), deducted 30% of the aggregate gross receipts to cover operat-

ing expenses and extended the remainder without debasement, scaling or equalization as the estimated net receipts for the year 1927. (Rec. 12, 13.) Seeley, who calculated the assessments for the Board of Review, was a witness upon the trial of the instant case. He sought to explain the failure to debase appellant's net receipts to sixty per cent for 1927 by saying that in his opinion if appellant had returned its net receipts from premiums on hazards other than fire, marine and inland navigation, such gross receipts would have been about twenty-five per cent greater than those returned, and that such increase by twenty-five per cent of the returned gross receipts was equivalent to an equalization with all other property in Cook County for the year 1927. (Rec. 135.) It was not claimed by the appellee that the estimated net receipts were debased to sixty per cent like all other property, but that the failure to increase the gross receipts by twenty-five per cent afforded some equivalent of debasement to sixty per cent of omitted net receipts. This is not so. If, as is claimed, the Board had assumed that the gross receipts of appellant ($165,670) represented seventy-five per cent of the gross receipts from all classes, such gross receipts from all classes would have been $220,888. Deducting expenses at thirty per cent (the Board's allowance) leaves net receipts of $154,622, which if debased to sixty per cent as was all other property leaves net receipts of $92,773.20 subject to tax. The amount entered on the books was $121,550, which demonstrates that the Board of Review, on the basis of its own assumptions, never accorded appellant the debasement to sixty per cent to which it was entitled.

The Supreme Court of Illinois, in deciding the instant case, rejected the assessments of the Board of Review for the years 1923 to 1926, inclusive, on the ground that the Board had no right to make assessments of so-called "omitted net re-

ceipts'' for such years where it had already exercised its discretion in acting upon sworn returns tendered by the companies and making assessments upon them, but for the year 1927, the Supreme Court of Illinois sustained the assessment made by the Board of Review on the ground that it was currently reviewing such assessment for that year and not making an assessment of so-called ''omitted net receipts.'' The Court cited a number of decisions to the point that equity will not relieve against an excessive valuation, where the taxpayer fails or refuses to appear before the assessing bodies. Appellant does not question this principle but it has no application to the facts in the case at bar. Waiving the question of the power of the Board of Review to estimate net receipts for 1927 at $121,550, appellant contends that once having made any estimate, the Board was required to debase it to sixty per cent like all other property. The Supreme Court of Illinois, in its opinion in the case at bar, passed over in silence this complaint of appellant. Thus, the rule for equality of taxation under Section 30, announced by this Court in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, was violated by the Board of Review in making the assessment for the year 1927, in 1928.

The Supreme Court of Illinois stated that the power of the Board of Review to make an ''estimate'' assessment for 1927 existed because of the failure of appellant to make its return for 1927 upon a form (called Form 16) promulgated by the State Tax Commission. It was admitted by counsel for appellee in his opening statement (Rec. 4-6) that the Supreme Court of Illinois had before it in 1928 an original mandamus case entitled *People, ex rel.* v. *Fayart*, in which the constitutional validity of Form 16 and of Section 30 in connection therewith was before the court for decision; that the court in an unanimous opinion

announced by Justice Duncan, occupying forty printed pages, decided in 1928 that both Form 16 and Section 30 were unconstitutional and void as depriving the foreign stock fire insurance company of the equal protection of the laws under the Fourteenth Amendment; that, after the opinion had been filed, a rehearing of the question was granted by the Court and immediately after such rehearing was allowed counsel for the People dismissed the original mandamus suit out of the Supreme Court of Illinois, and thereby prevented the unanimous opinion of the court from becoming effective. It appears further from the record (Rec. 105) that returns in the form of affidavit, showing gross receipts, operating expenses and net receipts, were accepted by the taxing authorities in lieu of any other form of return during the period of litigation involving the validity of Section 30. In view of the uncertainty as to the validity of Section 30 and Form 16 during 1927 and 1928, it was manifestly arbitrary to penalize appellant for not using Form 16 when the taxing bodies themselves had accepted the form of return submitted by the companies. However, quite apart from any such question, the assessment made by the Board of Review upon net receipts, without scaling or debasing, was in violation of the requirement of constitutional uniformity.

Had the value of net receipts for 1927, as estimated, been debased to 60%, the amount of such tax would have been $3,537.11 (the rate appearing by stipulation at 4.85 (Rec. 105)), as contrasted with an actual tax imposed for that year of $5,895.19. The arbitrary allowance of 30% for operating expenses appearing from the record should not be confused with debasement of the net receipts to 60%, to which appellant was entitled. The tax under Section 30 is a tax on net receipts, that is, gross receipts less operating expenses. The arbitrary allowance of only 30% was,

of course, a part of the calculation of net receipts without in any way being related to the debasement to 60% required by constitutional uniformity. *Once the net receipts were arrived at by any method, appellant was entitled to have the calculated amount debased to 60% like all other personal property in Cook County for the year 1927.* The failure of the Board of Review to debase its estimate and the refusal of the Supreme Court of Illinois to rectify the error resulted in the imposition of a tax against appellant approximately 40% greater than would have been imposed if its net receipts had been debased like other personal property.

CONCLUSION.

Upon the foregoing considerations, we respectfully submit that the judgment hereunder reviewed should be reversed on the grounds that

(*a*) Section 30 of the Act of 1869, construed as a property tax, is unconstitutional and void;

(*b*) An arbitrary discrimination and an illusory classification exists where a tax for revenue is laid upon appellant, while foreign casualty corporations, foreign associations, individuals, groups of individuals, and Lloyds, are permitted to compete in the writing of various classes of hazards directly with appellant in the same territory under the same conditions and at the same rates of premium and are exempted from the payment of any net receipts taxes upon premiums from such insurances, and from any similar or equivalent tax;

(*c*) Because appellant is taxed upon the net receipts derived from all classes of hazards insured and is denied

the right to deduct the insurance losses paid by it in arriving at the amount of its net receipts, while domestic insurance companies directly competing in the same territory in writing the same hazards at the same rates are taxed only upon what they have left on April 1st of each year, after deducting their operating expenses, paid losses, and all other business expenses, and pay no similar or equivalent tax;

(*d*) Because appellant was assessed on its estimated net receipts for the year 1927 at the full amount of such estimate without debasing the same to 60%, while the full fair cash value of all taxable property in Cook County for said year was uniformly debased to 60% as its assessed value;

(*e*) That whether the tax under Section 30 be in fact an excise tax or a property tax, the respective discriminations practiced against appellant in the foregoing particulars violated the constitutional rights of appellant under the guaranties of the Fourteenth Amendment and render all the taxes imposed for the years 1923 to 1927, inclusive, null and void.

Wherefore, appellant respectfully prays that the judgment of the Supreme Court of Illinois be reversed.

Respectfully submitted,

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APPENDIX I.

RELEVANT STATUTES QUOTED.

A.

Revenue Act of 1853.

Laws of 1853, pages 1, 14:

AN AGT for the assessment of property, and the collection of taxes, in counties adopting the township organization law.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That all property, whether real or personal, in this state; all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, of persons residing in this state, or used or controlled by persons residing in this state; the property or corporations now existing or hereafter created, and the property of all banks, or banking companies, now existing, or hereafter created, and of all bankers and brokers, except such property as is hereinafter expressly exempted, shall be subject to taxation; and such property, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, or the value thereof, shal be entered on the list of taxable property, for that purpose, in the manner prescribed in this act. * * *

Section 22. * * * *Provided,* that every agency of an insurance company, incorporated by the authority of any other state or government, shall return to the assessor of the

county in which the office or agency of such company may be kept, in the month of May, annually, the amount of the gross receipts of such agency, which shall be entered on the tax list of the proper county, and subject to the same rate of taxation for all purposes that other personal property is subject to at the place where located.

B.

Relevant Sections of Fire, Marine, and Inland Navigation Insurance Act of March 11, 1869, and Amendments Thereto.

Laws of 1869, pages 209, 220:

AN ACT to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That any number of persons, not less than thirteen, may associate and form an incorporated company for the following purposes, to-wit: To make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire, and the risks of inland navigation and transportation. Any and all insurance companies hereafter incorporated under the provisions of this act, which shall, in the declaration and charter provided to be filed, have expressed an intention to make insurance, or which shall have power to make insurance against loss or damage by the risks of inland navigation or transportation, shall have power to make insurance upon vessels, boats, cargoes, goods, merchandise, freights, and other property against loss and damage by all or any of the risks of lake, river, canal, and inland navigation and transportation.

Sec. 22. It shall not be lawful for any insurance company, association, or partnership incorporated by or organized under the laws of any other state of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this state unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; and any such company desiring to transact any such business, as aforesaid, by any agent or agents in this state shall first appoint an attorney in this state on whom process of law can be served, and file in the office of the auditor of public accounts a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted; and any process issued by any court of record in this state, and served upon such attorney by the proper officer of the county in which such attorney may reside or may be found, shall be deemed a sufficient service of process upon such company, but service of process upon such company may also be made in any other manner now provided by law.

Sec. 30. Every agent of any insurance company, incorporated by the authority of any other State or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—State, county, town and municipal—that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent herewith are hereby repealed: *Provided*, that the provisions of this section shall

not be construed to prohibit cities having an organized fire department from levying a tax, or license fee, not exceeding two per cent. in accordance with the provisions of their respective charters, on the gross receipts of such agency, to be applied exclusively to the support of the fire department of such city.

As amended by L. 1879, p. 179.

C.

Insurance against Lightning Authorized.

Laws of 1879—pages 178-179.

AN ACT to amend section one (1) of an act entitled "An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved March 11, 1869, and to fix the liability of certain insurance companies organized under said act. Approved May 31, 1879. In force July 1, 1879.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That section one (1) of an act entitled "An act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved March 11, 1869, be and the same is hereby amended so as to read as follows:

Sec. 1. (Who may incorporate—Purposes.) That any number of persons, not less than thirteen, may associate and form an incorporated company for the following purposes, to-wit: To make insurance on dwelling houses, stores and all kinds of buildings, and upon household furniture

and other property, against loss or damage by fire or lightning, and the risks of inland navigation and transportation. Any and all insurance companies hereafter incorporated under the provisions of this act, which shall, in the declaration and charter provided to be filed, have expressed an intention to make insurance, or which shall have power to make insurance against loss or damage by the risks of inland navigation or transportation, shall have power to make insurance upon vessels, boats, cargoes, goods, merchandise, freights and other property against loss and damage by all or any of the risks of lake, river canal and inland navigation and transportation.

Sec. 2. (Authority to companies already incorporated.) Any company heretofore incorporated under the provisions of this act which shall, in the declaration and charter filed in accordance with the provisions of said act, have expressed an intention to make insurance against loss or damage by fire, is hereby authorized to insure, also, against loss or damage by lightning; and in all cases wherein any such company has heretofore insured against loss or damage by lightning such insurance shall be binding on such company.

Approved May 31st, 1879.

D.

Insurance against Tornadoes Authorized.

Laws of 1881—page 85.

AN ACT to amend Sections one (1) and two (2), of "An Act to amend Section one (1) of an act entitled 'An Act to incorporate and to govern Fire, Marine and Inland Navigation Insurance Companies doing business in the

State of Illinois,' approved March 11, 1869, and to fix the liability of certain Insurance Companies, organized under said Act," approved May 31, 1879. Approved May 25, 1881. In force July 1, 1881.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That sections one (1) and two (2) of an act entitled "An act to amend section one (1) of an act entitled 'An Act to incorporate and to govern fire, marine and inland navigation insurance companies, doing business in the State of Illinois,' approved March 11, 1869, and to fix the liability of certain insurance companies organized under said act," approved May 31, 1879, be amended so as to read as follows:

1. Who may incorporate—Purposes.) Sec. 1. That any number of persons, not less than thirteen (13), may associate and form an incorporated company for the following purposes, to wit: To make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire, lightning and tornadoes, or either or any of said causes, and the risks of inland navigation and transportation: any and all insurance companies hereafter incorporated under the provisions of this act, which shall in the declaration and charter provided to be filed have expressed an intention to make insurance, or shall have power to make insurance against loss or damage by the risks of inland navigation or transportation, shall have power to make insurance upon vessels, boats, cargoes, goods, merchandise, freights, and other property, against loss or damage by all or any of the risks of lake, river, canal and inland navigation and transportation.

2. Authority to companies already incorporated.) Sec. 2. Any company heretofore incorporated under the provi-

sions of said act, or the act of which said act was an amendment, which shall in the declaration and charter filed in accordance with the provisions of said act, approved March 11, 1869, or said act approved May 31, 1879, have expressed an intention to make insurance against loss or damage by fire, or by fire and lightning, is hereby authorized to insure against loss by fire, lightning and tornadoes, or either or any of said causes; and in all cases wherein any such company has heretofore insured against loss or damage from either, any, or all, of said causes, such insurance shall be binding on such company.

E.

Insurance against Windstorms, Hailstorms and Cyclones Authorized.

Laws of 1885, pages 209, 210.

AN ACT authorizing fire insurance companies to insure against loss or damage by lightning, wind-storms, hail-storms, tornadoes, and cyclones.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That all insurance companies heretofore organized under any law or laws of the State of Illinois, having power to make insurance against loss by fire, are hereby authorized to insure houses, buildings, growing crops, live stock, and other property against loss or damage by lightning, wind-storms, hail-storms, tornadoes and cyclones, or either or all of them: *Provided*, the same shall be clearly expressed in the policies.

Approved, June 30, 1885.

F.

Casualty Act of 1899 as Amended.

AN ACT concerning the business of casualty insurance. Approved April 21, 1899. In force July 1, 1899. L. 1899, p. 237. Title as amended by L. 1919, p. 601, June 30, July 1.

Who may form—Purposes.) Section 1. Any number of persons, not less than thirteen, may, in the manner hereinafter prescribed, form a corporation for the purpose of issuing policies for any of the following kinds of insurance business:

First—Insuring any persons against bodily injury, disablement or death resulting from accident, and providing benefits for disability caused by disease.

Second—Insuring against loss or damage resulting from accident to, or injury suffered by, an employee or other person for which accident or injury the person insured is liable.

Third—To guarantee or indemnify merchants, traders and all others engaged in business and giving credit therein from loss or damage by reason of giving or extending credit to their customers.

Fourth—Against loss by burglary of theft or both.

Fifth—Upon glass against breakage.

Sixth—Upon steam boilers and pipes, engines and machinery connected therewith or operated thereby; against explosion and accident and loss or damage to life or property resulting therefrom and to make inspection of and to issue certificates of inspection upon such boilers and pipes,

engines and machinery; also upon elevators and machinery forming a part thereof and to make inspection and to issue certificates of inspection upon the same.

Seventh—Insuring against any hazard resulting from the ownership, maintenance or use of any automobile or other vehicle.

Eighth—Against any other casualty or insurance risk specified in the articles of organization, which may lawfully be the subject of insurance and the formation of corporations for insuring against which is not otherwise provided for by these statutes.

Note—As amended by L. 1921; p. 472, June 28, July 1.

Sec. 2. Any casualty insurance corporation organized under the laws of any other state or foreign country may be admitted to transact business in this State by filing with the insurance superintendent for his approval, the following documents and papers:

First—An application for license to do business in this State, setting forth the full name of the corporation, the location of its principal office of business, and separately, the several kinds of business to be transacted; said application shall contain the declaration prescribed in an act entitled "An Act for the better regulation of the business of insurance, and for the protection of the citizens of this State in their dealing with insurance companies," approved June 4th, 1879, in force July 1st, 1879, and otherwise conform to the requirements of said act, and such company shall also be subject to all the provisions, requirements and penalties of said act upon such form of blank as the said superintendent may prescribe.

Second—A certificate of deposit from the state official having the custody of the securities showing to the satis-

faction of said insurance superintendent that the corporation has the amount of funds required by this act to be deposited by companies incorporated in this State invested in securities deposited with the superintendent of the insurance department, State Treasurer or other proper officer of the state in which it is incorporated, if incorporated in the United States, and if a foreign corporation, then in some one of the states of the United States that such securities are not pledged or incumbered and have a market value of at least one hundred thousand dollars, but are held and remain for the benefit and security of the policy-holders of such corporation residing in the United States, or in default of such certificate of deposit shall deposit with the insurance superintendent for the benefit and security of its policy-holders the amount and kind of securities required to be deposited by companies of this State. The stocks and securities so deposited may be exchanged from time to time for other securities, to be approved by the insurance superintendent and so long as the corporation so depositing shall continue solvent and comply with the laws of this State, it may be permitted by the insurance superintendent to collect the interest or dividends on said securities.

Third—A duly certified copy of its charter and by-laws together with a certificate from the insurance superintendent or other proper officer of the state wherein incorporated, that the corporation is duly organized and licensed to transact the business of casualty insurance in such state, stating separately the different kinds of insurance, as provided in section 1 of this act, together with an appointment of the insurance superintendent of this State, and his successors in office, as attorney upon whom any summons, notice or process of any court of this State may be served.

Fourth—*A Complete Statement of the Financial Condition of the Corporation.*) All such corporations admitted to transact business in this State must comply with the laws governing like corporations organized under the laws of this State, except that such corporations as are at the date of the passage of this act admitted to transact in this State more than four of the kinds of business named in subdivisions of Section 1 hereof, may continue such business on a capital of not less than two hundred thousand dollars, and all such corporations and all persons acting as agents thereof shall be subject to the same penalties prescribed by these statutes relating thereto for a violation of any of the provisions thereof and to the same methods for the enforcement of such penalties. The said company shall apply annually to the insurance superintendent for a certificate for each of its agents to do business in this State.

G.

Insurance against Damage by Sprinkler Leakage and Fire Apparatus Authorized.

Laws of 1905, page 290.

AN ACT authorizing fire insurance companies to insure sprinklers, pumps or other fire apparatus, and also to insure against loss or damage by the same.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That all insurance companies authorized to transact fire insurance business in the State may, in addition to the business which they are now authorized by law to do, insure sprinklers, pumps, and other apparatus, erected, used or put in position for the purpose of extinguishing fires, against damage

or loss or injury resulting from any cause whatsoever; and may also insure any property which such companies are authorized to insure against loss or damage by fire, against damage, loss or injury by water or otherwise, resulting from the breaking of or injury to such sprinklers, pumps or other apparatus, or from the use or operation of the same, arising from any cause whatever, upon filing with the Insurance Department of the State of Illinois official notification of their purpose so to do: Provided, the same shall be clearly expressed in the policies.

Approved, May 16, 1905.

H.

Insurance on Motor Vehicles Authorized.

Laws of 1911-1912, First, Second and Third Special Sessions, pages 45-46:

AN ACT to amend section one of an Act entitled, "An Act to incorporate and govern fire, marine and inland navigation insurance companies doing business in the State of Illinois", (approved and in force March 11, 1869, as amended by Act approved May 25, 1881, in force July 1, 1881), by adding a sub-section to be known as section 1-a.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That section 1 of an Act entitled "An Act to incorporate and govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved and in force March 11, 1869, as amended by Act approved May 25, 1881, in force July 1, 1881, be and the same is hereby amended by adding to the said section 1 a sub-section to be known as

section 1-a, so that said section 1 as amended shall read as follows:

Sec. 1. That any number of persons, not less than thirteen (13), may associate and form an incorporated company for the following purposes, to-wit: To make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire, lightning and tornadoes, or either or any of said causes, and the risks of inland navigation and transportation. Any and all insurance companies hereafter incorporated under the provisions of this Act which shall, in the declaration and charter provided to be filed have expressed an intention to make insurance, or shall have power to make insurance against loss or damage by the risks of inland navigation or transportation, shall have power to make insurance upon vessels, boats, cargoes, goods, merchandise, freights and other property, against loss and damage by all or any of the risks of lake, river, canal and inland navigation and transportation.

Sec. 1-a. That all insurance companies authorized to transact the business of fire, marine or inland navigation insurance in this State, may, in addition to the business which they are now authorized by law to do, insure automobiles or other motor vehicles, whether stationary or being operated under their own power, against all or any of the risks of fire, lightning, wind storm, tornadoes, cyclones, explosions, hail storms, transportation by land or by water, theft and collision, upon filing with the Insurance Department of the State of Illinois official notification of their purpose so to do: *Provided*, the same shall be clearly expressed in the policies.

Approved June 11, 1912.

I.

Scope of Transportation Insurance Enlarged.

Laws of 1919, page 613.

AN ACT to amend section 1 of an Act entitled, "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois", approved and in force March 11, 1869, and as subsequently amended.

Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That section 1 of an Act entitled, "An Act to incorporate and to govern fire, marine and inland navigation insurance companies, doing business in the State of Illinois", approved and in force March 11, 1869, and as subsequently amended, be amended to read as follows:

Sec. 1. That any number of persons, not less than thirteen (13), may associate and form an incorporated company for the following purposes, to-wit: To make insurance on dwelling houses, stores, and all kinds of buildings, and upon household furniture and other property, against loss or damage by fire, lightning and tornadoes, or either or any of said causes and the risks of inland navigation and transportation. Any and all insurance companies heretofore or hereafter incorporated under the provisions of this Act, which shall, in the declaration and charter provided to be filed, have expressed an intention to make insurance, or shall have power to make insurance against loss or damage by the risks of inland navigation or transportation, shall have power to make insurance upon vessels, boats, cargoes, goods, merchandise, freights, and other property, against loss and damage by all or any of the risks of ocean, lake,

river, canal and inland navigation and transportation, and against loss or damage by explosion, whether fire ensues or not, except upon steam boilers and pipes, fly wheels, engines and machinery connected therewith or operated thereby.

Approved May 21, 1919.

J.

General Revision, whereby Fire, Marine and Inland Navigation Insurance Companies were again Authorized to Insure Against all the Foregoing Hazards, and in Addition to Insure Against Theft of Automobiles and Property Damage Caused by Automobiles.

Laws of 1925, pages 436-438:

AN ACT providing the kinds of business which may be transacted by fire insurance companies; to repeal an Act entitled "An Act authorizing fire insurance companies to insure against loss or damage by lightning, windstorms, hailstorms, tornadoes and cyclones," approved June 30, 1885, in force July 1, 1885, and to repeal an Act entitled "An Act authorizing fire insurance companies to insure sprinklers, pumps, or other fire apparatus, and also to insure against loss or damage by the same", approved May 16, 1905, in force July 1, 1905.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. All domestic insurance companies or insurance companies of other states or foreign governments authorized in this State to transact the business of fire insurance, are hereby empowered and authorized to make contracts of insurance, or to cede or receive reinsurance

thereon, for such of the following kinds of business as are specified in their articles of incorporation, namely:

(1) To make insurances upon property or any valuable interest therein against loss or damage caused by fire, lightning or other electrical disturbances, earthquake, windstorms, cyclone, tornado, tempest, hail, frost, snow, ice, sleet, weather or climatic condition, including excess or deficiency of moisture, flood, rain, or drought; a rising of the waters of the ocean or its tributaries, bombardment, invasion, insurrection, riot, civil war or commotion, military or usurped power, explosion, other than the explosion of steam boilers, or the breaking of fly wheels; against loss or damage from any cause to trees, crops, and farm products, and against loss or damage to property from any casualty, power to insure against which is not expressly conferred by other provisions of this Act.

(2) To make insurances against loss or damage to property and against the liability of the insured for loss or damage to the property of others caused by water entering through leaks or openings in buildings or from the breakage or leakage of sprinklers, pumps, water pipes, plumbing and all tanks, apparatus, conduits and containers designated to bring water into buildings or for its storage or utilization therein; or caused by the falling of a tank, tank platform or supports and against loss or damage from any cause to such sprinklers, pumps, water pipes, plumbing, tanks, apparatus, conduits, or containers.

(3) To make insurances upon teams, automobiles and all vehicles, airplanes, seaplanes, dirigibles and other aircraft—

(a) Against all loss or damage to the same, their fittings and contents from any cause, including the hazards of burglary, theft or other criminal act, vandalism or malicious mischief.

(b) Against loss or damage to property, including legal liability therefor, caused by the operation, maintenance and use of the same.

(4) To make insurances against loss or damage to vessels, craft, aircraft, automobiles and vehicles of every kind (excluding automobiles operating under their own power or while in storage not incidental to transportation) as well as all goods, freights, cargoes, merchandise, effects, disbursements, profits, moneys, bullion, precious stones, securities, choses in action, evidences of debt, valuable papers, bottomry and respondentia interests, and all kinds of property and interests therein in respect to, pertaining to or in connection with any or all risks or perils of navigation, transit or transportation, including war risks, on or under any seas or waters, on land or in the air, or while being assembled, packed, crated, baled, compressed or similarly prepared for shipment or while awaiting the same, or during any delays, storage, trans-shipment or re-shipment incidental thereto; including marine builders' risks, war risks; and for loss or damage to persons or property in connection with or appertaining to marine, inland marine, transit or transportation insurance including loss or damage to either, arising out of or in connection with the construction, repair, operation, maintenance or use of the subject matter of such primary insurance (but not including life insurance or surety bonds); but except as herein specified, shall not mean insurances against loss by reason of bodily injury to the person.

Sec. 2. An Act entitled "An Act authorizing fire insurance companies to insure against loss or damage by lightning, windstorms, hailstorms, tornadoes and cyclones," approved June 30, 1885, in force July 1, 1885, is hereby repealed.

Sec. 3. An Act entitled "'An Act authorizing fire insurance companies to insure sprinklers, pumps, or other fire apparatus, and also to insure against loss or damage by the same,'' approved May 16, 1905, in force July 1, 1905, is hereby repealed.

Approved June 30, 1925.

APPENDIX II.

TABLE SHOWING RECEIPTS FROM CERTAIN CLASSES OF BUSINESS OF FOREIGN FIRE INSURERS AND FOREIGN CASUALTY INSURERS FOR THE YEARS 1923-1927.

Motor Vehicle Insurance.

(Premiums Received in Illinois.)

Year	Foreign Stock Fire Insurance Companies	Foreign Stock Casualty Companies
1923	[1]$5,749,849.31	[2]$3,263,243.51
1924	[3]6,238,131.39	[4]2,415,978.20
1925	[5]6,634,547.17	[6]2,932,631.88
1926	[7]8,067,071.05	[8]2,960,793.93
1927	[9]8,207,980.43	[10]3,199,397.92

[1] 56th Annual Insurance Report of the Department of Trade and Commerce, Division of Insurance, of the State of Illinois, printed by authority of the State of Illinois—Part I, p. 112.

[2] Id. Part III, p. 73.

[3] 57th Annual Insurance Report, Part I, p. 100; 102.

[4] Id. Part III, p. 86.

[5] 58th Annual Insurance Report, Part I, p. 102; 104.

[6] Id. Part III, p. 86.

[7] 59th Annual Insurance Report, Part I, p. 110; 114.

[8] Id. Part III, p. 79.

[9] 60th Annual Insurance Report, Part I, p. 102; 104.

[10] Id. Part III, p. 87.

Sprinkler Leakage Insurance.

(Premiums Received in Illinois.)

Year	Foreign Stock Fire Insurance Companies	Foreign Stock Casualty Companies
1923	[1]$177,658.70	[2]$49,516.56
1924	[3]160,420.06	[4]46,968.55
1925	[5]185,097.29	[6]31,260.12
1926	[7]203,815.89	[8]32,560.32
1927	[9]267,208.12	[10]44,267.48

[1] 56th Annual Insurance Report of the Department of Trade a Commerce, Division of Insurance, of the State of Illinois, Part printed by authority of the State of Illinois, p. 113.

[2] Id. Part III, p. 73.

[3] 57th Annual Insurance Report, Part I, p. 100; 102.

[4] 57th Annual Insurance Report, Part III, p. 90.

[5] 58th Annual Insurance Report, Part I, p. 103; 105.

[6] Id. Part III, p. 90.

[7] 59th Annual Insurance Report, Part I, p. 111; 115.

[8] Id. Part III, p. 84.

[9] 60th Annual Insurance Report, Part I, p. 103; 105.

[10] Id. Part III, p. 92.

No. 72

IN THE

Supreme Court of the United States

October Term, A. D. 1933.

CONCORDIA FIRE INSURANCE COMPANY,
a Corporation,
Appellant,
vs.
THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal from the Supreme Court of the State of Illinois.

REPLY BRIEF FOR APPELLANT.

GEORGE WHARTON PEPPER,
WILLIAM B. BODINE,
FREDERICK D. SILBER,
HERBERT W. HIRSH,
Counsel for Appellant.

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IN THE

Supreme Court of the United States.

October Term, A. D. 1933.

CONCORDIA FIRE INSURANCE COMPANY,
A CORPORATION,

Appellant

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY BRIEF FOR APPELLANT.

We believe it will be of assistance to the Court if a brief restatement is made of appellant's contentions in the light of the argument submitted by the appellee.

I.

In the first place, the contentions of the appellant are all sustainable even if Sec. 30 of the Act of 1869 is not declared unconstitutional. We have in mind the decisions in which this Court has often pointed out a way in which a statute under attack could be so administered as to eliminate discrimination or inequality. Such, in the Hanover case, was clearly the decision of this Court as to this particular statute. The substantial rights of the appellant and of the other companies concerned in the instant case would be

tected if this Court were to refuse to declare the act unconstitutional but were to hold that the foreign companies cannot lawfully be taxed on receipts from casualty business* as long as competitors in that field are exempt; that in determining net receipts with a view to their taxation *as property*, losses must be deducted, as well as expenses; and that, treating section 30 as imposing a property tax, the same percentage of debasement must be applied as in the case of all other property.

Since this is the position of the appellant, it is wholly unnecessary to consider the contention of the appellee that a tax on the net receipts of foreign companies is a reasonable form of taxation. This may be conceded, if proceedings under the Act are controlled by the principles of equalization in the three particulars just specified. Nor is it necessary to debate the suggestion in the appellee's brief that some other form of tax would be fairer than a net receipt tax and that, if laid, such other tax would impose a heavier burden on the appellant. This case concerns Sec. 30 of the Act of '69. Of course it is possible that this Court will be discouraged by difficulties in the way of a fair administration of the Act of '69 as an Act taxing *property*. In this connection it was suggested in appellant's original brief that some of the difficulty results from taxing intangibles elsewhere than at the domicile of the owner. But the point is not essential to appellant's contention and is not pressed. The only question before the Court, therefore, is whether this particular statute can be so administered as to achieve equality of treatment. If it can (and the appellant concedes that it can) then the relief prayed for can be given without a declaration of unconstitutionality.

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*For convenience of statement the term "casualty business" is used in this brief as comprehending all types of business done by appellant other than fire, marine and inland navigation.

II.

In the next place, we submit that the record discloses all the facts necessary to raise the three points which appellant presses. We understand the following statements of fact to be undisputed:

(1) During the years from 1923 to 1926 inclusive appellant was not assessed for taxation upon receipts from its casualty business but was assessed for taxation in 1927 upon such receipts as well as upon its receipts from fire, marine and inland navigation insurance. The question whether it is unjust discrimination to tax appellant and other foreign corporations of its class upon their casualty receipts when similar receipts by other insurers escape taxation is therefore a question raised only for the year 1927. The question is important not because of the amount of money involved in that year but for the future guidance of the taxing authorities.

(2) In no one of the five years from 1923 to 1927 inclusive were the insurance losses sustained by the appellant deducted by the taxing authorities from appellant's gross receipts before determining the amount of its taxable net receipts. In other words, what the Illinois Court classifies as a property tax was assessed without a determination that there was any property to tax. Since all hands pay the tax on tangible personalty and since the domestic competitors of appellant pay a tax only on such intangible personalty as remains at the end of the year after losses have been paid, the question of discrimination becomes vitally important not only as to the future but also because the amount of money already involved is substantial.

(3) For each of the years from 1923 to 1926 inclusive the Supreme Court of Illinois held that the returns made by the appellant and other companies must be regarded as final because accepted and acted upon by the tax authorities and that the hypothetical computations of the Board of Review must for those years be rejected. The Court itself "debased" the net receipts shown by the appellant's returns (gross receipts less expenses only) to 30 per cent. of their face and, in so doing, to that extent properly applied the principle of equalization announced by this Court in the Hanover case (272 U. S. 494). For 1927, however, the Court sustained the hypothetical computation made by the Board of Review. As to that computation, the record discloses the following situation: the Board *did*, for 1927, include in its computation appellant's receipts from casualty business and did *not* "debase" the net receipts, when determined, to 60 per cent. of their face as required by the principle of equalization.* For the year 1927, therefore, it is clear that the appellant is entitled to relief because of failure to debase—unless the appellee can succeed in its contention that the appellant must be penalized because it declined in each of the five years to make its returns on the form required by the taxing authorities but insisted upon substituting a form of its own.

The validity of appellee's contention upon this point is the next question to be considered.

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*Prior to 1927 there was in Illinois a custom having the force of statute which required the taxing authorities first to debase property valuations to 60 per cent. of their face and then a statute required them to cut this debased value in half so that the tax was finally extended on 30 per cent. of estimated value. In that year the statute in question was repealed, so that for 1927 and subsequent years the debasement applicable to property taxation in general was to 60 per cent. of the estimated value without further reduction.

III.

In appraising the conduct of appellant in making its returns upon other than the demanded form, the Court will, we trust, be enlightened by the following statement:

During 1922 (the year in issue in the Hanover case) and in each year thereafter down to and including 1927 the taxing authorities and companies of the appellant's class were deadlocked on the question of the validity of the Act of '69 as interpreted by the State. The taxing authorities were insisting that the tax under the Act was an excise tax collectible on 100 per cent. of gross receipts. The appellant and others were insisting that so construed the act was unconstitutional and that if it laid a property tax the same debasement must be applied as in the case of all other property taxation. The taxing authorities were also maintaining that the appellant and others of its class were taxable upon net receipts derived, inter alia, from casualty business. The companies were insisting that taxation on such receipts was an unjust discrimination. The taxing authorities kept demanding that returns be made upon "Form 16" (Record pp. 113-119) acquiescence in which would have conceded the validity of the Act of '69 as interpreted by the State. The appellant and the other companies accordingly substituted and filed in each year a short form of return which gave lumping figures but made no dangerous concessions (see Record p. 100) and these forms, as the Supreme Court of Illinois has found, were accepted and acted upon by the taxing authorities for all the years from 1923 to 1926 inclusive.

The Court will therefore note that this is not the case in which a taxpayer has made *no* return. Nor is the case

one in which the taxpayer's return as filed was incorrect *in fact:* the questions involved being purely questions of law. That these questions of law were really disputable and that their pendency left everybody honestly doubtful of his rights is demonstrated by the proceedings in the Supreme Court of Illinois in what is known as the Fayart case. At the relation of the taxing authorities an application was made in that case to the Supreme Court of Illinois by the State for a mandamus to compel an insurance agent to make his company's return on Form 16. After due consideration the Court (on December 18, 1928) delivered a unanimous opinion per Duncan, *J.*, that the 30th section of the Act of '69 was unconstitutional and void as being unlawfully discriminatory and not susceptible of equalization by adjustment and declared that Form 16 fell with the Act. The Court will note that this was two years after the decision of this Court in the Hanover case, and that the Illinois Court went farther in the Fayart case than this Court had gone in the Hanover case. Thereupon the State sought a reargument. The Court dismissed the State's petition but of its own motion ordered a reargument; whereupon the State proceeded to withdraw its application for a mandamus, thus terminating the case and preventing the question from being authoritatively decided. The appellee therefore is right in the assertion that the decision in the Fayart case does not stand as a judgment of the Supreme Court of Illinois. But we are equally right in asserting that the course of the proceeding in that case shows conclusively that the appellant, during the years in question, was not acting perversely when it refused to use Form 16 and substituted returns of its own.

IV.

The next question is whether, as contended by the appellee, all the points which appellant now makes were considered and disposed of by this Court in the Hanover case.

It is true, as stated by the appellee, that the Hanover case was a test case in the outcome of which the appellant and 207 other foreign companies were interested. It is also true (as will be explained later in this brief) that after the decision in the Hanover case all of the companies were aggrieved by the way in which the State proposed to apply the principles announced in that decision. However, all but seventeen of the companies made a compromise with the State. The appellant is one of the seventeen that did not thus compromise and is now seeking (for itself and them) a final judicial determination of their rights. The appellant is of course not questioning the soundness of the decision in the Hanover case. On the contrary, the appellant is relying on that decision and is not now consciously urging any proposition inconsistent with what was there decided. Nevertheless the appellee contends that this Court in the Hanover case decided that no unjust discrimination results from taxing the appellant on its casualty business and not taxing its competitors; and further contends that this Court in the Hanover case had before it the question of the deductibility of losses and must be taken to have decided it against the appellant.

It is confidently submitted that the appellee is wrong on both points.

The Hanover case involved the tax assessed for a single year only—1923. It is a fact, as correctly asserted by the appellee in its brief in the instant case (p. 11) that in that

year the taxing authorities did not include casualty receipts in the tax assessment then complained of. The question on that point now raised by the appellant could not have been considered in the Hanover case otherwise than as a moot question. Moreover the reference to the subject in the opinion of Chief Justice Taft is obviously a mere statement of what had theretofore been decided on this subject by the Illinois Court. He merely cites and summarizes the decision of that Court in *Fidelity & Casualty Co. v. Board of Review*, 264 Ill. p. 11. We submit that the question of the validity of the resulting discrimination against the appellant is ripe for decision upon the record and that it has never been passed upon by this Court.

As to the deductibility of losses, it is true that Chief Justice Taft, in stating what the Illinois law was on the subject, cited and summarized the decision in *National Fire Insurance Co. v. Hanberg*, 215 Ill. 378,—the case in which the Illinois Court held that "net receipts" in Sec. 30 of the Act of '69 meant gross receipts less the expenses of the business not including losses. But it is also true (as conceded by the appellee on p. 21 of the appellee's brief in the instant case) that the appellant's claim of right to deduct insurance losses was never made until after the record in the Hanover case had been made up. It is difficult to understand how now it can seriously be argued that appellant is precluded from urging upon this Court a point never yet urged before it.

A study of the opinion in the Hanover case shows that two problems received this Court's entire attention: first, was there unjust discrimination against a foreign corporation through failure to debase the valuation of its property?—and, second, if so, could this be justified as an exercise of the State's power to prescribe the terms upon

which foreign corporations may do business within it? Having decided that there *was* discrimination and that it could not be justified on the State's theory, the judgment below was reversed with a procedendo. If the judgment had been affirmed in the Hanover case there would be weight in the argument that appellant cannot now advance a reason based on then-existing facts why the case should have been decided the other way. Even on the supposition of affirmance, however, no valid reason could be given against the right to raise now a question which could not have been raised on the former record. But when it is recalled that the judgment, instead of being affirmed, was reversed with a procedendo surely it is in order for the successful litigant to call this Court's attention to subsequent disregard, as to 1927, by the taxing authorities and by the Court below of the principle of equalization by debasement laid down here and to advance two more instances of unjust discrimination at least equally as serious as the one previously condemned by this Court.

V.

The appellee contends that the record in the instant case fails to disclose facts sufficient to establish the discrimination of which the appellant complains as between itself and foreign casualty insurers. It is respectfully submitted that this contention has no foundation in fact.

It is conceded by the appellee that in Cook County, during the year 1927, two general classes of property insurance were being done. One was fire, marine and inland navigation insurance; the other included insurance against lightning, tornado and a large variety of similar risks, explosions (other than steam boiler), sprinkler leakage,

automobile, vehicle and other like insurance. (Record p. 159.) A complete list of the sorts of insurance included in the second category (which in this brief is for convenience referred to as casualty insurance) will be found in the second assignment of error on page 159 of the Record.

Insurance of the former sort can be written in Illinois only by insurers (domestic or foreign) organized to do a fire, marine and inland navigation insurance business. Casualty companies are prohibited from underwriting risks of this class. By Acts passed in 1879 and subsequently (see Appellant's Brief pp. 10-11) the fire, marine and inland navigation insurers were authorized to engage also in insurances of the second sort. By an Act adopted in 1899 foreign casualty companies were authorized to transact in Illinois insurance business of the second sort.

Such being the situation as far as the statutes are concerned, it was stipulated (see Record p. 99) "that foreign casualty insurance companies also carried on such competitive business and were not taxed on their net receipts derived therefrom." "Such business" refers to the whole field of insurance of the second of the two categories specified above, *i. e.*, all forms except fire, marine and inland navigation.

With these facts before it, the Court has all the information which it needs to determine whether it is fair to the fire insurance company which also does a casualty business that it should be taxed in respect of the latter when foreign casualty insurers (individual or corporate) are engaged competitively in precisely the same kind of casualty business and are exempt from any taxation in respect of it. It is, of course, understood, that both the appellant and the foreign casualty insurer pay the privilege tax of 2 per cent.

on gross receipts for the right to do business in Illinois and that they also pay the personal property tax. The appellant is called upon to pay the net receipts tax and the casualty insurers are not called upon to pay it.

It would have been idle for the appellant to encumber the record with descriptive statements of what the insurance business is. This is matter of common knowledge. It would have been a waste of the Court's time to give detailed proof of the magnitude of the business of the foreign casualty insurers and financial statistics respecting the extent of the competition. The form of stipulation follows that which was the basis of the judgment of this Court in *Quaker City Cab Co. v. Pennsylvania.* A reference to the record in that case on file in the office of the Court will show (p. 5 thereof) that, apart from a set of figures concerning the business of the appellant and a brief description of the taxicab business, the only fact related to the discrimination complained of was the following: "7. The defendant is subjected to competition in its business by individual, partnership and unincorporated taxicab operators." All that the Court needs to know is that the business done by the appellant and by the foreign casualty insurer is identical, that the two insurers are in competition with one another and that the appellant is taxed while its competitor is not.

The appellee on page 48 of appellee's brief seeks to create the impression that at least some of the foreign casualty insurers were, by an Illinois Act of 1911, subjected to the same burden of taxation that rests upon the appellant. Not only, however, does the suggestion thus made apply only to foreign casualty insurers that are unincorporated, but even among such unincorporated insurers it applies only to the extremely restricted class of so-called "reciprocal insurers", *i. e.,* unincorporated groups formed for a narrow

class of mutual insurance. The fact is undisputed and indisputable that as to the great lines of insurance included in the second of the two categories above specified, casualty insurers pay no taxes while the State seeks to impose them on the appellant.

The appellee attempts to distinguish the instant case from the Quaker City Cab case and to bring it within the principle applied in Pacific Express Co. v. Seibert, 142 U. S. 339. The former case was fully discussed in appellant's original brief. Suffice it to remind the Court that the instant case is *a fortiori* to the Quaker City Cab case. There it was a debatable question whether it was not justifiable to except an individual operator in a certain business and to tax a corporation engaged in the same business. In the instant case the discrimination is not as between a corporation and an individual but as between a corporation engaged in a specified business and others engaged in the identical business, whether they be incorporated or not.

In the Seibert case the tax was imposed upon the gross receipts of "any person, persons, joint stock association or corporation" which convey property "by express on contract with any railroad or steamboat company" and exempted railroads and steamboat companies. This Court merely held that there was no invalidity merely because railroads and steamboat companies were exempted because (142 U. S. p. 354):

> "They do not do business under the same conditions, or under similar circumstances. In the nature of things, and irrespective of the definitive legislation in question, they belong to *different classes.*"

That statute taxed all express companies whether corporate or non-corporate, and does not sustain the attempted classi-

fication in the case at bar. The decision merely sustained the proposition that express companies may be classed and taxed separately from railroads and steamboats.

VI.

The appellee attempts to justify the refusal to permit appellant to deduct losses from gross receipts not (after stating that domestic competitors get the benefit of such a deduction.

The attempted justification (pp. 20 et seq. of appellee's brief) takes the form of an elaborate statistical argument designed to show that unless appellant is taxed on gross receipts diminished only by certain expenses and certain losses, the State of Illinois will not be able to reach for taxation all the intangible elements of value which appellant company possesses. The answer is that, just as Illinois subjects its domestic insurance companies to a capital stock tax, so the state of the domicile of each of the foreign companies concerned in this suit may do the like. What Illinois in fairness should do in the case of a foreign corporation is (if it is imposing a property tax) to determine what property the foreign corporation has in the State at a given time and then tax such property. This is what is done in the case of the Illinois capital stock tax on domestic companies of appellant's class. They pay on what is left of their property at the end of the tax year. The difficulty in equalizing a net receipts and capital stock tax grows out of the fact that a net receipts tax falls on receipts that come in day by day, whereas the other tax fastens only upon the residuum of value at the end of the year. It is a fact in this case that the appellant's expense ratio (gross

by the taxing authorities) is 30 per cent. and its loss ratio is not less than 45 per cent. (Record 107). If a tax is levied —not on 25 per cent. of gross as it should be, but on 70 per cent. of gross, it is idle to call such an exaction a property tax and to justify it on the ground that the State needs the money.

To the appellee's suggestion that domestic insurance companies presumably have a large amount of tangible personalty in the State and that foreign companies do not, the obvious answer is two-fold: first, that there is in fact no such presumption, since an agency equipment may be more extensive than that of the home office; and, second, that even such a presumption does not explain why Illinois taxes foreign fire companies on their net receipts and does not tax foreign casualty companies on theirs.

It is earnestly submitted that if the principle of equalization laid down in the Hanover case is applied to sec. 30 of the Act of '69 it must result in the deduction of losses before it can be determined what, *as property*, is left of the gross premiums that have been received.

VII.

With respect to the failure to debase the tax valuation for 1927, the appellee has fallen into a serious mistake of fact. Referring to a statement in appellant's original brief to the effect that appellant did not get the benefit of debasement in that year, the appellee (p. 53) has this to say: "This same statement, in substance, was made in the brief for appellant in the Supreme Court of Illinois and was there so clearly shown to be untrue that it was abandoned by appellant's counsel and, for that reason, was not noticed in that court's opinion." In point of fact, not only was the

contention of the appellant strongly presented to the Supreme Court of Illinois in brief and in oral argument but the failure of the Court to accept the contention was made by the present appellant the subject of a petition for rehearing—from paragraph I of which we quote:

> "Petitioner respectfully points out that this Honorable Court erred in treating the tax for 1927, assessed by the Board of Review in 1928, as a valid and legal tax. Clearly the different treatment given the 1927 tax by the Court was the result of the misapprehension of the stipulated and uncontradicted evidence in the record. The oversight doubtless arises from the fact that on the trial below and in this court, the parties treated the taxes for the years 1923 to 1927, and each of them, as governed by the same principles. The Court, in its opinion, has drawn a distinction, treating the 1928 assessments by the Board of Review of 1923 to 1926 net receipts as void, but giving validity to the assessment for 1927. The case at bar is a test case (Abst. 6); sixteen other similar suits against other companies are made dependent upon its final outcome. If the Court fails to reconsider its erroneous treatment of 1927 taxes, the litigants in all of the cases in question will be required to pay $57,394 more than they would be required to pay if this Court treated the liability for 1927 taxes in the same manner and according to the principles under which the taxes for 1923 to 1926, inclusive, are treated. We, therefore, earnestly submit that all other questions apart, the ends of justice require a reconsideration of the amount of the tax imposed for the year 1927."

Again and again the appellee refers to the fact that the returns made by appellant were not made on the form demanded by the taxing authorities. The justification for

the appellant's course has already been set forth in this brief and is, we submit, complete. Even were the principle invoked by the appellee to be applied it would merely preclude the appellant from questioning the appraisement or valuation made by the taxing authorities: it would not deprive the appellant of its right to have that valuation debased to 60 per cent. thereof. That this was the constitutional right of the appellant was determined in the Hanover case.

In conclusion, we submit that

(1) There is no legitimate basis for a classification which results in taxing foreign fire companies on their casualty business and exempting foreign casualty insurers that compete with them. Both are foreign insurers, the class of business done is the same. That is the beginning and end of the matter.

(2) There is no legitimate basis for a classification which results in imposing a tax on the property of domestic fire insurance companies, as valued after their losses have been deducted, while imposing a tax upon the intangible property of foreign fire insurance companies represented by their receipts without permitting the deduction of their losses. The only difference between the two companies is that one is foreign and the other is domestic. When once (as in this case) the foreign company has paid 2 per cent. upon its gross receipts for the privilege of doing business in Illinois, the significance of the geographical distinction is removed. This Court, in the Hanover case, was therefore clearly right in holding that if the property of domestic companies is debased to 30 per cent. for the purpose of the

tax, the property of the foreign companies must be likewise debased. It inevitably follows that if domestic companies are permitted to deduct their losses, foreign companies should likewise be permitted to deduct theirs.

Respectfully submitted:

GEORGE WHARTON PEPPER,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. [redacted] 12

CONCORDIA FIRE INSURANCE COMPANY,
APPELLANT,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

THOMAS J. COURTNEY,
LEON HORNSTEIN,
LOUIS H. GEIMAN,
HARRIS F. WILLIAMS,
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Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 790

CONCORDIA FIRE INSURANCE COMPANY,
APPELLANT,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

STATEMENT BY APPELLEE AS TO THE JURISDICTION OF THE COURT.

The Facts in the Case.

In 1853 the General Assembly of Illinois passed a General Revenue Act, Section 22 of which (Laws of Illinois of 1853, p. 147) was as follows:

> "Every agency of an insurance company, incorporated by the authority of any other state or government, shall return to the assessor of the county in which the office or agency of such company may be kept, in the month of May annually, the amount of the *gross* receipts of such agency, which shall be entered on the tax list of the proper county, and subject to the same rate of taxation for all purposes that other personal property is subject at the place where located."

That act was passed fifteen years before the adoption of the Fourteenth Amendment to the United States Constitution and of course it was then a valid law. In 1869, after the adoption of the Fourteenth Amendment, the General Assembly, in its wisdom, saw fit to take that provision out of the General Revenue Act and insert it, but slightly changed, in the Fire, Marine and Inland Navigation Insurance Company Act of that year as Section 30. The only substantial change made was the reduction of the tax from one on *gross* receipts to one on *net* receipts. From 1869 down to 1921 the taxing authorities of Illinois, together with its Supreme Court, construed this Section 30 as providing for a personal property tax and requiring the net receipts to be assessed upon the same basis of valuation, that is, by equalization and division by 5, 3 or 2, as the laws from time to time provided in respect to personal property, and no one, not even the numerous insurance companies which were taxed under it, had the slightest suspicion that it operated as a denial of the equal protection of the laws. We are therefore dealing with a law the validity of which was not questioned for sixty-five years.

In 1921, however, in the case of *People* v. *Kent*, 300 Ill. 324, the Supreme Court of Illinois, without being asked to do so, of its own motion, overruled its previous decisions and held that the tax was a privilege tax which was to be extended, not upon the same debased and equalized valuation applied in the assessment of personal property, but upon the full amount of the net receipts. This led to the decision of this Court in *Hanover Fire Insurance Company* v. *Harding*, 272

U. S. 494, in which this Court reversed the judgment of the Supreme Court of Illinois in *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, and held, not as seems to be contended for by appellant, that Section 30 of the 1869 law was in violation of the Fourteenth Amendment, but that it would be so held if the tax were extended upon the full amount of net receipts instead of upon the debased and equalized value thereof. As a result of this Court's decision the Supreme Court of Illinois, in *Hanover Fire Insurance Company v. Harding*, 327 Ill. 590, overruled its previous decisions holding the tax was a privilege tax and held that the net receipts must be assessed upon the same basis of valuation as other personal property.

In this connection the attention of the Court is called to the fact that the case of *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, was a test case prosecuted by a number of insurance companies by bill in equity to enjoin the collection of the tax. One of the grounds of complaint was that the companies were taxed upon insurance receipts other than those derived from fire, marine and inland navigation insurance, whereas foreign casualty companies were not taxed on such other receipts, and hence there was an illegal discrimination against foreign fire insurance companies in favor of foreign casualty companies as well as in favor of domestic companies. In its opinion this Court held that foreign fire insurance companies, if they engaged in these other kinds of business, were taxable upon the receipts derived therefrom (272 U. S. 506). The same counsel representing the appellant in

this case represented the Hanover Fire Insurance Company in that case.

The attention of the Court is also called to the fact that Chief Justice Taft, in delivering the opinion of the Court in that case (272 U. S. 516), said:

> "Under the previous decisions of the Supreme Court of Illinois when the net receipts were treated as personal property, and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the state, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property, including their net receipts or what they were invested in."

If this was not an invitation by this Court to the Supreme Court of Illinois to make the tax valid by overruling its previous opinions and treating the tax as a personal property tax, what was it? After saying in that opinion that "it *might* well have been said," etc., could the Court, with due regard to consistency, now say "it *could not* well have been said," etc.?

It will be seen that the Court did not merely reverse the judgment of the Supreme Court of Illinois without remanding the case, as it would have done had it intended to hold Section 30 of the Act of 1869 wholly null and void, but it concluded its opinion as follows:

"The judgment of the Supreme Court of Illinois must be reversed and the case remanded *for further proceedings not inconsistent with this opinion.*"

After the decision of the Supreme Court of Illinois in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, in which the court complied with the mandate of this Court, the Board of Review of Cook County gave the insurance companies, over 200 in number, notice to appear before the Board and present their returns of net receipts in the manner specified by the Board, which was in accordance with a form prescribed by the Illinois Tax Commission and approved by the Supreme Court of Illinois in *People* v. *Barrett*, 309 Ill. 53. The insurance companies appeared by their attorneys, one of whom had appeared for the appellant in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, and who now appears for the appellant in this case. Instead of furnishing the Board of Review the information which the Board asked for and to which, under the law, the Board was entitled, the insurance companies denied the power of the Board to compel them to furnish any further information. The taxing bodies, by the aid of an expert employed for that purpose, furnished the Board with the best information obtainable, and the Board thereupon made the assessments. Being refused information, which the insurance companies could have furnished, but refused to furnish, the Board made the assessment as best it could, and that assessment, under the repeated rulings of the Supreme Court of Illinois, the insurance companies were estopped from questioning.

Upon the making of the assessments by the Board of Review, the taxes were extended and suits were brought against two hundred and eight of the insurance companies to collect them. All of the companies excepting eighteen settled their liabilities through a compromise upon a basis which they deemed satisfactory and which was slightly lower than that fixed by the Supreme Court of Illinois in the instant case. The seventeen companies contested their liability. In doing so they first took the opinion of the Supreme Court of Illinois in *People* v. *Franklin National Insurance Company,* 343 Ill. 336, upon the validity of Section 30 of the Act of 1869 by resting their case upon a demurrer to the declaration. After that case was decided against them the remaining seventeen cases were tried as one case under an agreement by which judgment was to be entered as to the liability of one company and the liability of the other companies was to abide the result.

Neither before the Board of Review nor before the court below was any evidence introduced by the companies to show what their net receipts actually were in previous years. Consequently it is impossible for the court to determine whether the assessments made were excessive, no matter what kind of receipts were required to be assessed.

In the statement presented by appellant, attention is called to the fact that the expert from whom the Board of Review received information was employed upon the basis of a contingent fee. In reply to the suggestions of counsel for the appellant it will be sufficient

to call attention to what the Supreme Court of Illinois says in its opinion in the instant case, *People* v. *Concordia Fire Insurance Company*, 350 Ill. 374-379. In the opinion of the court there was nothing in the record tending to impeach the fairness of the expert's work.

There are some inaccuracies in appellant's statement, but it is not deemed worth while to refer to them, inasmuch as they are such as can have no bearing upon the correctness of the decision appealed from. In the view of appellee the undisputed facts require a decision in favor of appellee.

Motion to Dismiss or Affirm.

The appellee now moves the Court to dismiss the appeal or to affirm the judgment of the Supreme Court of Illinois on the following grounds:

First. While, strictly speaking, the Court has jurisdiction to determine whether a law such as Section 30 of the Act of 1869 is in violation of the Fourteenth Amendment, yet when it has once decided the question it is not bound to reconsider it subsequently every time some litigant seeks to raise it. The Court in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, used language clearly expressing the view that that section, if construed as it had been construed prior to the decision in *People* v. *Kent*, 300 Ill. 324, would be held valid. After so deciding and inducing the taxing authorities of the State to act upon it, it ought not to entertain jurisdiction for the purpose of making a different decision. When the question whether a law

violates the Fourteenth Amendment has been considered and decided, it will not be a basis for a subsequent appeal or writ of error.

King v. *West Virginia*, 216 U. S. 92.
Leonard v. *Vicksburg, etc., R. Co.*, 198 U. S. 416.

In this connection it is to be observed that when the Supreme Court of Illinois in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, construed the opinion of this Court in *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, as holding Section 30 of the Act of 1869 to be valid if the tax were extended in the same manner as property taxes generally, the insurance companies accepted the decision and allowed the taxing authorities to act upon it. One hundred and ninety out of two hundred and eight of them have accepted the decision as final and have paid their taxes. That fact, coupled with the previous acquiescence of the insurance companies for over fifty years in the enforcement of the laws justifies the Court in refusing to give it further consideration.

For this reason the appeal should be dismissed.

Second. Assuming the Court may hold the case is one for the exercise of its jurisdiction, it should affirm the judgment of the Supreme Court of Illinois for the following reasons:

1. Section 30 of the Act of 1869 was merely a re-enactment, with but slight changes, of Section 22 of the General Revenue Act of 1853 (Laws of Illinois of 1853, p. 147), which had been in force fifteen years prior to the adoption of the Fourteenth Amendment.

"It is important for this court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted and which, it is safe to say, that no one then supposed would be disturbed." *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 43. Add to this fifty years of acquiescence in the law by all of the insurance companies and we have a state of facts which ought to preclude a decision at this late day overturning the statute as being in violation of the Fourteenth Amendment.

2. Before the Court can hold that the tax is unjustly discriminatory, it is not sufficient that it see that the tax imposed upon foreign companies is different from that imposed upon domestic companies, but the Court must be able to say that the tax imposed upon the former, in its practical operation, amounts to a greater burden than that imposed upon the latter.

Lindsley v. *Nat. Carbonic Gas Co.*, 220 U. S. 61.
Quong Wing v. *Kirkendall*, 223 U. S. 58.
Citizens Nat. Bank v. *Durr*, 257 U. S. 99.
Interstate Busses Corporation v. *Holyoke Ry.*, 273 U. S. 45.

This the Court would not be able to do. There is no showing as to how the taxes imposed upon the different classes of companies compare with each other. Domestic companies pay taxes in Illinois upon all their property, both tangible and intangible, including their capital stock and the good will of their business. For-

eign companies do business in Illinois without having any taxable property therein. They use capital in the State, but there is no means of knowing how much, or how it compares with the capital of domestic companies. To hold there is unjust discrimination, the Court would be compelled to hold that a difference in the method of taxation alone would amount to unjust discrimination. This cannot be done.

The insurance companies not having shown what the facts are, the Court has nothing before it from which it can determine whether the tax, in its practical operation, works unjust discrimination.

3. To hold that there was unjust discrimination as between foreign and domestic fire insurance companies the Court would be compelled to overrule a long line of its prior decisions.

In *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, the Court held that a Missouri act imposing a two per cent gross receipts tax upon express companies which conveyed express matter on contracts with any railroad or steamboat company was not repugnant to the Fourteenth Amendment because it did not impose a like tax upon railroad or steamboat companies which carried express matter upon their own means of conveyance. That decision has been cited with approval in at least eighteen subsequent decisions commencing with *Giozza* v. *Tiernan,* 148 U. S. 657, and ending with *Roberts and S. Co.* v. *Emmerson,* 271 U. S. 50.

See also the following:

Western Union Telegraph Co. v. *Indiana,* 165 U. S. 304.

King v. *Mullins,* 171 U. S. 404.

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89.
Williams v. *Fears*, 179 U. S. 270.
Florida C. & R. R. Co. v. *Reynolds*, 183 U. S. 470.
Traveler's Ins. Co. v. *Connecticut*, 185 U. S. 364.
Kidd v. *Alabama*, 188 U. S. 730.
Shaffer v. *Carter*, 252 U. S. 37.

4. As to the claim that there is an unjust discrimination between foreign *fire* insurance companies and foreign *casualty* companies, but little need be said. Casualty companies were first authorized to do business in Illinois in 1899. If, prior to that time, Section 30 of the Act of 1869 was valid as between domestic fire insurance companies and foreign fire insurance companies, it could not be rendered invalid by a subsequent law allowing casualty companies to carry on business in Illinois without paying taxes on their net receipts. If any invalidity resulted it would be invalidity of the subsequent casualty company law and not Section 30 of the Act of 1869.

This point is very clearly presented in the opinion of the Supreme Court of Illinois in *People* v. *Franklin National Insurance Company*, 343 Ill. 336. We call particular attention to what the court says on pages 342 to 345, inclusive.

Apart from this no facts are alleged, much less proven, upon which the Court could find there was any injustice in discriminating between foreign *fire* insurance companies and foreign *casualty* companies. The record contains no evidence showing the amount of the taxes paid by the casualty companies as compared with the taxes paid by the fire insurance companies.

5. Another fatal objection to reversing the judgment of the Supreme Court of Illinois is the refusal of the insurance companies to make the returns which the Board of Review notified them to make. It is the settled law of the State that a property owner who, when called before the Board of Review, refuses to furnish the information requested will not be heard to complain that the assessment is excessive.

Leper v. *Pulsifer*, 37 Ill. 110.
Cummins v. *Weber*, 218 Ill. 521.
Peirce v. *Carlock*, 224 Ill. 608.

6. Finally, it is equally fatal to the right of appellant to question the correctness of the assessment that, upon the hearing in the trial court, appellant made no proof of the actual amount of its receipts and expenses. The Supreme Court of Illinois has uniformly held that a taxpayer who comes into a court of equity with a complaint that an assessment is fraudulently excessive, must show by evidence what the actual value of the property was.

Sanitary District v. *Young*, 285 Ill. 351.
Jeffery Apartment Corporation v. *Harding*, 347 Ill. 341.

If, as claimed by appellant, no receipts other than those derived from fire, marine and inland navigation insurance could lawfully be assessed, appellant is not in a position to show such receipts were assessed, and this for the reason that it cannot be told what the true amount of receipts was. This disposes of the claim that the Board of Review took 100 per cent instead of 60 per cent of the net receipts for 1927 as the assessed value, a claim which is not sustained by the evidence

in any event, as the record shows that they allowed a debasement to 75 per cent of what they estimated the receipts to be. What the assessment would have been had the insurance companies shown what their receipts actually were cannot be determined. The Court, therefore, cannot say the assessments were too high.

Appellant insisted in the courts below upon being given the standing of a complainant in a court of equity. To be given that standing it was bound to "lay its cards upon the table" and prove the actual facts and not compel the court to make a guess.

It is therefore respectfully submitted that the appeal in this case should be dismissed on the ground that the question of the constitutionality of the law was settled by this Court in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, or, if the Court feels bound to assume jurisdiction, that the judgment of the Supreme Court of Illinois should be affirmed because it is so clearly right that further argument of the case would not be justified.

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Received a copy of the foregoing statement this 14 day of February, 1933.

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Counsel for Appellant.

(3129)

CONCORDIA FIRE INSURANCE COMPANY,

Complainant,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLEE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

CONCORDIA FIRE INSURANCE COMPANY,
a Corporation,

Appellant.

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The judgment of the Supreme Court of Illinois is divisible into two parts, the first dealing with the taxes for the years 1923 to 1926, inclusive, and the second dealing with the taxes for the year 1927.

The Taxes for 1923-1926.

In each of the years 1923 to 1926, inclusive, the Board of Review had accepted the Insurance Company's returns of net receipts as correct and in compliance with the mandate of the Supreme Court of Illinois in the *Barrett Case*,

309 Ill. 53, had assessed them the full amount without debasement or division by 2. Accordingly the assessments (Printed Record, pp. 28-29) were as follows:

For the year 1923	$ 85,926.00
For the year 1924	139,035.00
For the year 1925	153,315.00
For the year 1926	96,853.00

Had these returns been accepted by the Board of Review in 1927 as correct and reduced by debasement and division to 30 per cent, as the Insurance Company claimed should have been done, the assessments and the taxes thereon (Printed Record, pp. 28-29) would have been as follows:

	Assessments	Taxes
For the year 1923	$25,777.80	$2,017.00
For the year 1924	41,710.50	3,528.00
For the year 1925	45,994.50	4,072.00
For the year 1926	29,055.90	2,694.00
Total taxes		$12,311.00

The Board of Review, however, in reviewing these assessments in 1927 and making in place thereof alleged "omitted property" assessments, rejected the returns which the Insurance Company had made and made new assessments which (Printed Record, pp. 28-29), with the taxes extended thereon, were as follows:

	Assessments	Taxes
For the year 1923	$74,000.00	$5,853.40
For the year 1924	83,365.00	7,019.48
For the year 1925	55,910.00	5,059.58
For the year 1926	67,070.00	6,312.96
Total taxes		$24,245.42

In its opinion in this case (Printed Record, pp. 147, 148, 153, 154) the Supreme Court of Illinois held that the as-

sessments which had been made by the Board of Review in those previous years could not be changed by the subsequent Board of Review in 1927, but must be treated as valid and binding. Accordingly the court, in pursuance of the stipulation of the parties by which the action was to be treated as one in equity, decreed that the Insurance Company, instead of paying the $24,245.42 of taxes, should pay the $12,311, the amount which it insisted was the proper amount if its own returns were accepted and reduced by debasement and division to 30 per cent.

The only receipts included in the returns made by the insurance companies were those from *fire, marine and inland navigation insurance* (Printed Record, pp. 17, 18, 99, 103).

Hence, so far as the taxes for the years 1923 to 1926, inclusive, are concerned, the Insurance Company has no valid ground of complaint if Section 30 of the Act of 1869 is a valid law when construed as one imposing a personal property tax extended upon the same percentage of value as that applied in the assessment of other personal property and when no other receipts are assessed than those derived *from fire, marine and inland navigation insurance.* It is taxed for those years precisely as it claimed in the *Hanover Case* it was entitled to be taxed if the law was valid and the tax was extended upon the amount of the net receipts properly debased and equalized. *Furthermore, it was taxed upon its own returns voluntarily made.*

The Taxes for 1927.

The assessment made by the Board of Review for the year 1927 was an original assessment and not an omitted property assessment. The insurance companies, over 200

in number, appeared before the Board of Review pursuant to notice, refused to furnish the Board with the information which it asked for and the result was a net receipts assessment against the appellant amounting to $121,550, upon which the taxes extended were $5,895.19 (Printed Record, p. 29). The complaint against these taxes, aside from the complaint that Section 30 of the Act of 1869, however construed, is in violation of the Fourteenth Amendment, is (Appellant's Brief, pp. 45, 46, 50) that the assessment was made by deducting only 30 per cent from gross receipts on account of expenses and extending the remainder without debasement, scaling or equalization. This complaint, as we shall show later on (*post*, pp. 53-54) is without foundation so far as the debasement, scaling or equalization is concerned. Furthermore the refusal of appellant to file a return, or give the Board required information, precluded it from successfully complaining of the amount of the assessment.

Adding the $5,895.19, as the taxes for 1927, to the $12,311 for the years 1923 to 1926, inclusive, made the total $18,206.19 for which the Supreme Court of Illinois rendered judgment.

SUMMARY OF ARGUMENT.

I.

The constitutionality of Section 30 of the Act of 1869 was settled by the decision of this court in Hanover Fire Insurance Company v. Harding, 272 U. S. 494.

Hanover Case, 272 U. S. 506-507.

Printed Record in *Hanover Case*, p. 43 (Appendix, *post* 58-65).

Printed Record in this case, pp. 158, 159.

II.

There are essential differences between the Hanover case and the Quaker City Cab Company case.

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389.

III.

Pacific Express Company v. Seibert, 142 U. S. 339, has not yet been overruled.

Pacific Express Co. v. Seibert, 142 U. S. 339.

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Shaffer v. *Carter*, 252 U. S. 37.
Watson v. *State Comptroller*, 254 U. S. 122.
Packard v. *Banton*, 264 U. S. 140.
Roberts & S. Co. v. *Emmerson*, 271 U. S. 50.
Hart Refineries v. *Harmon*, 278 U. S. 499.

IV.

The fact that in ascertaining net receipts losses from fire and other risks are not deducted from gross receipts does not invalidate the tax.

National Fire Ins. Co. v. *Hanberg*, 215 Ill. 378.
Hanover Case, 272 U. S. 506.
Section 12 of Act of 1869.
Pacific Express Co. v. *Seibert*, 142 U. S. 339.

V.

A fairer method of taxing the foreign insurance companies would be by a capital stock tax.

VI.

In determining whether the tax on net receipts is illegally discriminatory, the privilege tax imposed by the Act of 1919 must be ignored.

Hanover Case, 272 U. S. 510, 511.

VII.

Permitting casualty companies to do some of the kinds of business done by fire insurance companies cannot be given the effect of invalidating Section 30 of the Act of 1869.

Hanover Case, 272 U. S. 473.

Lindsley v. *National Carbonic Gas Co.,* 220 U. S. 61.

Quong Wing v. *Kirkendall,* 223 U. S. 58, 59.

Citizens Bank v. *Durr,* 257 U. S. 99.

Interstate Busses Corporation v. *Holyoke,* 273 U. S. 45, 54.

Weaver v. *Palmer Bros. Co.,* 270 U. S. 402.

Minnesota Rate Cases, 230 U. S. 352.

VIII.

Permitting casualty companies to do some of the kinds of business done by fire insurance companies cannot be given the effect of relieving foreign fire insurance companies from the payment of the net receipts tax on their receipts from the kinds of business done by casualty companies.

IX.

The complaint that non-incorporated companies, individuals and Lloyds were not taxed on their net receipts is of no force.

Roach & Co. v. *Harding,* 348 Ill. 454.

Allgeyer v. *Louisiana,* 165 U. S. 578.

St. Louis Cotton Compress Co. v. *Arkansas,* 260 U. S. 34.

Barnes v. *People,* 168 Ill. 425.

X.

The question of the omission to tax casualty companies does not affect the taxes for the years 1923 to 1926, inclusive.

XI.

The opinion of the Supreme Court of Illinois in People ex rel. v. Fayart is of no weight as authority in the instant case.

People v. *Barrett*, 309 Ill. 53.
Hanover Fire Ins. Co. v. *Carr*, 317 Ill. 366.
Hanover Fire Ins. Co. v. *Harding*, 272 U. S. 494.
Hanover Fire Ins. Co. v. *Harding*, 327 Ill. 590.

XII.

The taxes for the year 1927 are valid.

Pratt v. *Raymond*, 188 Ill. 469.
Earl & Wilson v. *Raymond*, 188 Ill. 15.
American Express Co. v. *Raymond*, 189 Ill. 232.
Leper v. *Pulsifer*, 37 Ill. 110.
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Peirce v. *Carlock*, 224 Ill. 608.
Sanitary District v. *Young*, 285 Ill. 351.
Jeffery Apartment Bldg. Corporation v. *Harding*, 347 Ill. 341.

ARGUMENT.

I.

The constitutionality of Section 30 of the Act of 1869 was settled by the decision of this court in Hanover Fire Insurance Company v. Harding, 272 U. S. 494.

In that case the court had before it the following facts:

1. That foreign fire insurance companies were taxed not only upon their net receipts from fire, marine and inland navigation insurance, but also on their net receipts from tornado, theft, explosion, damage to property by collision, crop and other similar lines of insurance, whereas domestic fire insurance companies were not so taxed otherwise than by the taxes upon the property in which their net receipts were invested and their capital stock. This is stated in the opinion of Mr. Chief Justice Taft, 272 U. S., pp. 505-506.

2. That the net receipts so taxed were the gross receipts after operating expenses had been deducted, the losses from fire and other risks assumed not being deducted. This also is stated in the same opinion, 272 U. S., p. 506.

3. That domestic and foreign casualty companies, Lloyd Associations and individuals were engaged in the insurance of risks from tornado, theft, explosion, etc., and were not taxed on their net receipts therefrom. This is shown by the record to have been claimed by the Insurance Company in the *Hanover Case* (Printed Record in that case, pp. 7-9, 10, 40, *post* 59-63).

4. That from 1869 to 1922 the tax on net receipts was treated as a tax on personal property and their assessment was by equalization and debasement reduced from full value as all other personal property. This is shown by the opinion of Mr. Chief-Justice Taft, 272 U. S. 506-507, as well as by the record in the *Hanover Case* (Printed Record in that case, p. 43).

These are the same facts now relied upon by appellant in support of its claim that Section 30 of the Act of 1869 is in violation of the Fourteenth Amendment. It is claimed, however, by appellant that some of the questions now presented were not presented to this court in the *Hanover Case*. These questions claimed not to have been so presented, and which appellant now insists upon presenting as new questions, are, *first*, whether foreign fire insurance companies are illegally discriminated against because casualty companies, whether foreign or domestic, as well as Lloyd's Associations and individuals, are not taxed upon their net receipts *through a special net receipts tax*, and, *second*, because there is an arbitrary discrimination in favor of domestic fire insurance companies, in that they are permitted to have the benefit of a deduction of their losses paid while foreign fire insurance companies are denied the same deduction.

In effect appellant claims that although no new facts are presented by the record, it is entitled to present new arguments which might have been presented in the *Hanover Case* had counsel then seen fit to present them. To fully appreciate the unfounded character of this claim it is only necessary to compare the first two assignments of error in the *Hanover Case* (Appendix, *post*, pp. 57-58), with the first, second and third assignment of errors in the instant case (Printed Record, pp. 158, 159), and with

the allegations of the complainant's bill in the *Hanover Case* (Appendix, *post*, pp. 59-63), from which it will appear that in that case as well as in this the Insurance Company claimed the law violated the Fourteenth Amendment by discriminating against foreign fire insurance companies not only in favor of domestic fire insurance companies, but also in favor of domestic and foreign casualty companies, individuals and other insurers.

Furthermore, on page 74 of the brief for plaintiff in error in the *Hanover Case* (on file in the clerk's office), the court will find the following:

> "The plaintiff in error is compelled, for example, to pay tax upon all *crop insurance, upon all automobile theft and collision insurance and upon all sprinkler leakage insurance*. They are competitively written by domestic fire insurance companies *and by so-called casualty companies*. The plaintiff in error has power by its charter and under license to do such business and like power is lodged in competitors to do an identical business. *The plaintiff may not lawfully be subjected to tax upon such writings from which such others are exempted*. It is not a valid classification in such a revenue producing law to put plaintiff in error into a burdened class from which such others are exempted merely because the charter of plaintiff in error permits it to do fire insurance, which right is denied to *the casualty companies*, whereas the tax is upon receipts from insurance upon crop, against the elements, such as wind and hail, sprinkler leakage, theft, collision, explosion, etc."

As a matter of fact, in that case, as in this, there was no assessment for the years 1923 to 1926, inclusive, of any receipts than those derived from fire, marine and inland navigation insurance.

It is clear that the court was called upon in the *Hanover Case* to decide, upon the same state of facts now alleged,

that the law in question violated the Fourteenth Amendment. It is equally clear that if the law was invalid the Insurance Company was entitled to have it so declared and the litigation ended by a simple reversal of the judgment. The court, however, not only did not declare the law invalid, but on the contrary declared it would be valid if properly construed. Nothing could be plainer than what the court intended when, in its opinion (272 U. S. 516), it said:

> "When the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, *it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations,*" etc., etc.

Of course whenever it *may well be said* that no discrimination exists, the court cannot hold the Fourteenth Amendment is violated. To justify overturning the law the discrimination must be manifest either on the face of the law itself or through evidence brought before the court, the burden of proof being upon the party assailing the law as invalid.

Any claim of appellant that is not bound by the decision in the *Hanover Case* because it was not a party to it would be without force. That case was one of eleven cases prosecuted for the benefit and at the expense of all the foreign fire insurance companies then doing business in Illinois by bills in chancery filed in the Superior Court of Cook County, Illinois. One of the companies was the National Fire Insurance Company which is also one of the companies the rights of which are to be settled by this appeal. Extracts from its bill in chancery are set forth in the record in this case. (Printed Record, pp. 109-113.)

The *Hanover Case* was selected as a test case. They employed an eminent lawyer, the present Chief Justice of this court, who argued the case in their behalf before the court. The same counsel who represented the appellant in the court below appeared as one of the counsel for the Hanover Company throughout the entire litigation. *Hanover Fire Insurance Co.* v. *Carr*, 317 Ill. 366; *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 474; *Hanover Fire Insurance Company* v. *Harding*, 327 Illinois 590.

But assuming the decision in the *Hanover Case* is not binding upon appellant, it is plain it was correctly decided.

II.

There are essential differences between the Hanover case and the Quaker City Cab Company case.

In *Quaker City Cab Company* v. *Pennsylvania*, 277 U. S. 389, relied upon by appellant as an authority against the validity of this law now in question, the court had before it a Pennsylvania statute providing as follows:

> "That every * * * transportation company, * * * now or hereafter incorporated or organized by or under any law of this commonwealth, or now or hereafter organized or incorporated by any other state or by the United States or any foreign government, and doing business in this commonwealth, and owning (or) operating any railroad or other device for the transportation of freight or passengers or oil * * * shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation * * * received from passengers and freight traffic transported wholly within the state. * * *"

The Cab Company was subject to competition in its busines by individuals and partnerships operating taxicabs. The act did not apply to them, and no tax was imposed upon

their receipts. Corporations operating taxicabs were not exempted from any of the taxes imposed upon natural persons carrying on that business. *Every such corporation, whether domestic or foreign, paid a capital stock tax of five mills on the actual value of its capital stock and a bonus of one per cent on the par value of all stock issued, if it was a domestic corporation,* AND A LIKE RATE ON ITS CAPITAL EMPLOYED IN PENNSYLVANIA IF IT WAS A FOREIGN CORPORATION.

This court, in holding the law to be in violation of the Fourteenth Amendment, among other things, said:

> "The equal protection clause extends to foreign corporations within the jurisdiction of the state and safeguards to them the protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances. * * * *The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its legislation to differences in situation or forbid classification in that connection,* but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. * * * Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchises. It is not taken in lieu of any other tax or used as a measure of one intended to fall elsewhere. It is laid upon and is to be considered and tested as a tax upon gross receipts; it is specifically that and nothing else."

The case thus dealt with by the court was essentially different from that now before it.

First. A foreign taxicab company cannot carry on business within a state without having property within its juris-

diction subject to taxation. It must at least have taxicabs and facilities for taking care of them during the hours of the day when they are not in use. These taxicabs and facilities are property, either personal or real, which is subject to property taxation. On the other hand foreign fire insurance companies can and do carry on business within the State of Illinois without having within its jurisdiction any property whatever. It is safe to say that out of the upwards of 200 such companies carrying on business in Illinois, there are not 20 of them which have any property at all within the state or pay any taxes other than net receipts taxes. It is true the Revenue Act contains provisions which requires all tangible personal property to be assessed and taxed, whether it is owned by domestic or foreign companies, but this does not result in the taxation of the tangible property of the foreign companies for they have none within the state. This fact is clearly pointed out by the Supreme Court of Illinois in *Hanover Fire Ins. Co.* v. *Harding*, 327 Ill. 590, 597. Therefore, as foreign corporations are not taxed on their intangible property by means of a capital stock tax or otherwise, the practical operation of the Revenue Act is to relieve foreign fire insurance companies from all other property taxation and they would escape taxation altogether if they could not be taxed upon their receipts. This is made clear by the evidence introduced upon the trial by the Insurance Company showing that the business of the insurance companies is done by agents who are paid by commissions out of which they pay all their office expenses and then remit the premiums, less their commissions, to the different companies (Printed Record, p. 104). They have no occasion for owning property within the state and there is no evidence in the rec-

ord that the appellant ever did own any such property or pay any taxes thereon.

Second. The laws of Pennsylvania imposed a property tax upon the taxicabs and other tangible personal property of both domestic and foreign taxicab companies and in addition thereto imposed upon a domestic company a capital stock tax of five mills on the actual value of its capital stock, together with a bonus of one-third of one per cent on the par value of all its stock issued. *It also imposed upon a foreign company a tax of five mills on its capital employed in Pennsylvania, thus putting domestic and foreign companies upon as nearly a substantial equality as was practicable.*

There is no similarity between the *Taxicab Company Case* and the instant case. The contest in that case was not one between a domestic corporation and a foreign corporation, but was one between corporations, both domestic and foreign, on the one side and individuals on the other. The corporations, solely because they were corporations, were subjected to a tax which was a privilege or occupation tax to which individuals were not subjected, but to which they might have been subjected just as well as corporations.

In the instant case the tax is not a privilege or occupation tax but is a special form of property tax, the property being premiums which the foreign corporations withdraw from the state before they can be assessed but which the domestic companies cannot evade taxation on.

Appellant in its brief insists that the tax is not a property tax but an occupation tax. We will not waste time by disputing by what name the tax is called. In any event it is a special form of tax to compensate for the property tax imposed upon domestic companies but which it would be impossible to impose upon the foreign companies.

III.

Pacific Express Company v. Seibert, 142 U. S. 339, has not yet been overruled.

In *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, 35 L. Ed. 1035, the court sustained the validity of a Missouri Act which imposed a tax upon the business of express companies which employed railroad and steamboat companies to carry their express matter, although it did not impose a like tax upon railroad or steamboat companies which also carried on express business and used for that purpose their own means of conveyance. In delivering the opinion of the court Mr. Justice Lamar, among other things, said:

> "There is an essential difference between the companies defined by this act and railroad or steamboat companies or other companies that own their own means of transportation. The vital distinction is this: Railroad companies pay taxes on their roadbeds, rolling stock, and other tangible property, as well as, generally upon their franchise; and steamboat companies likewise pay a tax upon their tangible property. * * * On the other hand, express companies, such as are defined by this act, have no tangible property of any consequence, subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all unless by a tax upon their receipts for business transacted. This distinction clearly places express companies defined by this act in a separate class from companies owning their own means of transportation. They do not do business under the same conditions or under similar circumstances. In the nature of things, and irrespective of the definitive legislation in question, they belong to different classes."

The reasoning of this opinion applies with equal force to the difference between the taxation of domestic insurance companies and the taxation of foreign insurance companies. The former must pay taxes upon property of at least the

par value of their capital stock, plus their unearned premiums, while the latter, as this court has pointed out, are in a position to escape property taxation altogether.

That the case thus cited is plainly decisive of the instant case is shown by the following provision in the Missouri Act which was assailed in that case as in violation of the 14th Amendment (142 U. S. 340, 341, 35 L. Ed. 1036).

> "And providing, further, that nothing herein contained shall release such express companies from the assessment and taxation of their tangible property in the manner that other tangible property is assessed and taxed."

As a matter of course, the express companies must have had some tangible property, such as office furniture, horses, wagons, &c., and thus must have been compelled to pay personal property taxes, while in the instant case it was not necessary for the insurance company to have any tangible property at all.

The tax imposed by that act was two per cent of the company's gross receipts after deducting therefrom the amounts paid to the railroad and steamboat lines for transporting the express matter. The amounts thus paid were in reality the receipts of the railroad and steamboat lines so that the remaining receipts were really the gross receipts of the express company. The receipts taxed were the receipts within the state on local business and the proper proportion of the receipts from inter-state traffic.

This decision of the court has never been questioned or overruled, but on the contrary has been cited with approval in the following among other subsequent cases:

Gulf, &c. Ry. Co. v. *Ellis*, 165 U. S. 155 Ed. 668.

Adams Express Co. v. *Ohio*, 165 U. S. 223, 228, 41 L. Ed. 696, 698.

Western Union Telegraph Co. v. *Indiana*, 165 U. S. 309, 41 L. Ed. 727.

Magoun v. *Illinois T. & S. Bk.*, 170 U. S. 292, 42 L. Ed. 1043.

Tullis v. *Lake Erie, &c., R. Co.*, 175 U. S. 353, 44 L. Ed. 195.

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 95, 45 L. Ed. 105.

Florida C. & P. R. R. Co. v. *Reynolds*, 183 U. S. 470, 46 L. Ed. 287.

Beers v. *Glynn*, 211 U. S. 484, 53 L. Ed. 293.

Citizens Telephone Co. v. *Fuller*, 229 U. S. 330, 57 L. Ed. 1213.

St. Louis Southwestern Ry. Co. v. *Arkansas*, 235 U. S. 368, 59 L. Ed. 273.

Paine Lumber Co. v. *Neal*, 244 U. S. 450, 61 L. Ed. 1256.

Shaffer v. *Carter*, 252 U. S. 37, 64 L. Ed. 447.

Watson v. *State Comptroller*, 254 U. S. 122, 65 L. Ed. 170.

Packard v. *Banton*, 264 U. S. 140, 68 L. Ed. 596.

Roberts & S. Co. v. *Emmerson*, 271 U. S. 50, 70 L. Ed. 827.

Hart Refineries v. *Harman*, 278 U. S. 499, 73 L. Ed. 477.

Of the above cases *Packard* v. *Banton*, 264 U. S. 148, was decided February 18, 1924, opinion by Mr. Justice Sutherland; *Roberts & S. Co.* v. *Emmerson*, 271 U. S. 50, was decided April 12, 1926; opinion by Mr. Justice Stone, and *Hart Refineries* v. *Harman*, 278 U. S. 499, was decided February 18, 1929, opinion by Mr. Justice Sutherland. In the latter case *Pacific Express Co.* v. *Seibert*, was cited in support of the following propositions:

> "The power of the State to classify for purposes of taxation is of wide range and flexibility, provided that the classification rests upon a substantial difference so that all persons similarly circumstanced will be treated alike. Statutes which tax one class of property while excepting another class necessarily result in imposing a greater burden upon the property taxed than would be the case if the omitted property were included. But such statutes do not create an inequality in the constitutional sense. Nor is the imposition of an excise tax upon one occupation, or one activity from which other and different occupations are exempt, a denial of equal protection. It is enough if all in the same class are included and treated alike. These propositions are so firmly established by repeated decisions of this court that further discussion is unnecessary."

As we shall point out later on *Pacific Express Co.* v. *Seibert*, also disposes of the contention of appellant, that to render the law in question valid, fire losses, in addition to expenses, should be deducted from gross receipts.

IV.

The fact that in ascertaining net receipts losses from fire and other risks are not deducted from gross receipts does not invalidate the tax.

The fact that such losses were not deducted was before this court in the *Hanover Case* and was mentioned in the opinion of Mr. Chief Justice Taft, 272 U. S. 506. It is therefore not a new fact, although it is made the basis of a new argument.

The claim of right to deduct fire losses came before the Supreme Court of Illinois in *National Fire Insurance Co.* v. *Hanberg*, 215 Ill. 378, where it was decided aversely to appellant's contention and that decision has been acquiesced in by all of the 208 foreign fire insurance companies ex-

cepting the 17 which are interested in the present appeal, and was not questioned by these 17 until the trial of this case in the Circuit Court in 1932. The evidence introduced upon that trial (Printed Record, p. 107) showed that fire losses consumed at least 45% of the gross receipts and it was claimed that expense consumed about 50% more, so that, according to appellant's claim only about 5% of the gross receipts would be subject to the tax if fire losses and all expenses were deducted. The tax upon that basis would be so small in any event that it would scarcely be worth the expense of assessment and extension. In many cases there would be no tax at all.

The situation in respect to these deductions is not essentially different from that presented in *Pacific Express Co. v. Seibert*, 142 U. S. 339 (*ante*, p. 17). As pointed out in our comment on that case (*ante*, p. 18) the Express Company was required to pay taxes on whatever tangible property it owned, but was allowed to deduct therefrom the amount paid the railroad and steamboat companies for carrying the Express Company's express matter, *but not the other expenses of carrying on its business, such as office rents, salaries of agents and other employees and the other costs of collecting and distributing its express matter.* Its tax, therefore, was not a tax on net profits, but upon the gross amount paid by the shippers less the shares received by the railroad and the steamboat companies for the portion of the work performed by them.

Counsel for appellant, in their efforts to magnify the burden imposed upon the foreign fire insurance companies by the tax, ignore the nature of their business and the source of their profits. As is well known a fire insurance company is of the nature of an investment trust. Its principal profits are from its investment of its unearned pre-

miums, just as the profits of a bank result from its loaning out the money of its depositors until it is called for.

The insurance laws of Illinois do not control the disposition of the premiums received by a foreign fire insurance company and consequently these premiums, less the agent's commissions, which do not exceed 25%, can be, and, in fact, are, removed out of the State and the company, therefore, escapes the payment of any taxes on them or on the securities in which they are invested. When thus removed they are kept invested, just as the moneys of a bank are kept invested, until it becomes necessary to use them in the payment of fire losses. It is important, therefore, to consider what part the premiums of a fire insurance company play in the production of profits from the carrying on of its business.

Fire insurance companies in Illinois, as in other States, are under the supervision of an insurance department the duty of which is to see that they obey the regulatory provisions of the law and keep in a solvent condition and that their premium rates are neither excessive nor so low as to endanger their ability to meet their obligations to their policy holders. They are required to make reports each year showing the business transacted, their receipts, assets, expenses, losses, liabilities, etc., and the results of their reports are published annually by the Division of Insurance of the Department of Trade and Commerce in a printed volume entitled "Insurance Report of the Department of Trade and Commerce, Division of Insurance, Part 1, Fire Insurance." The reports for the years in question contain full information respecting the business and the financial condition of the appellant and the other 16 companies the taxes on which are involved in this appeal. We shall select for illustration the following items:

CONCORDIA FIRE INSURANCE COMPANY.

(Excepting as otherwise indicated the items include the entire business of the company in all the States.)

Page		1924
51	Total assets	$6,217,310.90
50	Loans on bonds and mortgages	1,759,900.00
51	Bonds and shares of stock ov	3,280,655.00
59	Total liabilities (including unearned premiums)	4,283,969.12
59	Unearned premiums	3,882,004.34
59	Paid up capital	1,000,000.00
59	Surplus over all liabilities	933,350.87
59	Total capital and surplus	1,933,350.87
9	Total net premiums received	3,509,200.00
97	Total net premiums received in Illinois	413,694.43
29	Total losses paid	1,593,195.93
87	Total losses paid in Illinois	112,974.09
29	Agents' commissions, brokerage, allowance, etc.	914,278.89
29	Salaries of officers and employees	393,525.99
29	Dividends paid	130,000.00
29	All other disbursements	307,997.01
29	Total disbursements	3,475,586.03
9	Income from interest, dividends and rents	258,304.01
9	Profit on sale, etc., of assets	1,845.00
9	Income from all other sources	226,928.30
67	Income over disbursements	520,392.57

These figures illustrate our contention that a foreign insurance company is an investment trust and that while its profits from fire insurance, after deducting from gross premiums all expenses and fire losses, may be very small, it receives a large income from the investment of its unearned premiums which it removes from Illinois and thus frees from Illinois property taxation.

Thus we find from the foregoing statement the following interesting facts:

Unearned premiums on hand	$3,882,004.34
Outstanding loans on bonds and stocks	1,759,900.00
Income producing bonds and stocks	3,280,655.00
Total of last two items	5,039,955.00
Capital stock and surplus	1,933,350.87
Excess of loans, bonds and stocks over capital and surplus	3,106,604.13
Income over and above fire losses, all other expenses and $130,000 dividends	520,392.57

For the year 1925 (Report, p. 69) the company's income over disbursements, including $90,000 of dividends, was $330,905.47.

For the year 1926 (Report, p. 75) the company's disbursements, including $80,000 of dividends, exceeded its income by $120,832.89.

From these figures we see that, in addition to dividends on its capital stock and surplus, the company receives a very large income from the securities in which its unearned premiums are invested.

Inasmuch as a domestic insurance company is taxed in Illinois by applying the tax rate to the value of all its property, tangible and intangible, as represented by its paid in capital and surplus together with its good will, it would seem that taxing a foreign insurance company doing business in Illinois by applying the tax rate to its capital employed in Illinois would not result in any injustice to it but would be treating it liberally. That is the method employed in Pennsylvania (*ante*, p. 14) and that employed in New York in taxing insurance corporations of foreign countries (Appendix, *post*, pp. 65, 66). As we shall point out later on (*post*, p. 37), a fairer way would be to ascertain the market value of its total shares of capital stock and apply the tax rate to such a proportion of such total value, as the amount of its premiums received in Illinois bears to its

total premium receipts. The capital, aside from good will, employed in Illinois would be such a proportion of its capital and surplus as the business it transacts in Illinois, as represented by its net premiums there received, bears to its entire business as represented by its total premium receipts.

Taking as illustrations the three years 1924, 1925 and 1926, the results are as follows:

CONCORDIA FIRE INSURANCE COMPANY.

(*The figures in parentheses represent the pages of the report.*)

1924.

Total assets (51)	$6,217,310.90
Total liabilities (59)	4,283,969.12
Unearned premiums (59)	3,882,004.34
Paid up capital (59)	1,000,000.00
Surplus (59)	933,350.87
Capital and surplus (59)	1,933,350.87
Total net premiums received (97)	3,509,200.00
Net premiums received in Illinois (29)	413,694.43
Percentage of Illinois business	11.78%
Capital and surplus attributable to Illinois, being 11.78% of $1,933,350.87	227,848.63
Illinois capital and surplus debased to 30%	68,354.59
Tax rate for 1924	8.4 %
Tax on $68,354.59 computed at 8.4%	5,741.78
Tax for Cook County as fixed by court below (Printed Record, p. 29)	3,528.00

CONCORDIA FIRE INSURANCE COMPANY.

1925.

Total assets (51)	$6,564,842.84
Total liabilities (61)	4,763,794.03
Unearned premiums (61)	4,117,897.43
Paid up capital (61)	1,000,000.00
Surplus (61)	801,048.81
Capital and surplus (61)	1,801,048.81

Total net premiums received (21)	3,530,052.29
Net premiums received in Illinois (97)	366,432.52
Percentage of Illinois business	10.38%
Capital and surplus attributable to Illinois, being 10.38% of $1,801,048.81	187,348.86
Illinois capital and surplus debased to 30%	56,204.66
Tax rate for 1925	9.05%
Tax on $56,204.66 computed at 9.05%	5,086.52
Tax for Cook County as fixed by court below (Printed Record, p. 29)	4,072.06

CONCORDIA FIRE INSURANCE COMPANY.

1926.

Total assets (53)	$6,575,515.49
Total liabilities (65)	5,132,493.48
Unearned premiums (65)	4,271,074.74
Paid up capital (65)	1,000,000.00
Surplus (65)	443,022.01
Capital and surplus (65)	1,443,022.01
Total net premiums received (21)	3,676,113.94
Net premiums received in Illinois (105)	275,031.47
Percentage of Illinois business	7.48%
Capital and surplus attributable to Illinois, being 7.48% of $1,443,022.01	107,937.99
Illinois capital and surplus debased to 30%	32,291.39
Tax rate for 1926	9.29%
Tax on $32,291.31 computed at 9.29%	3,001.07
Tax for Cook County as fixed by court below (Printed Record, p. 29)	2,694.00

There are sixteen other companies which are interested in this appeal by virtue of stipulations that the decisions in their cases are to abide by the result of this case (Printed Record, pp. 27-44). We shall select the three largest of these companies, to-wit, the Dubuque Fire and Marine Insurance Company, the Milwaukee Mechanics Insurance Company and the National Fire Insurance Company of Hartford, and present similar figures bearing upon the justice of their taxation. The figures are taken from the

reports for the years 1924, 1925 and 1926, the pages being indicated by the figures in parentheses.

DUBUQUE FIRE AND MARINE INSURANCE COMPANY.

1924.

Total assets (51)	$4,047,145.44
Total liabilities (59)	2,475,170.61
Unearned premiums (59)	2,226,293.37
Paid up capital (59)	500,000.00
Surplus (59)	1,071,974.93
Capital and surplus (59)	1,571,974.93
Total net premiums (9)	1,712,618.21
Illinois premiums (97)	394,035.89
Percentage of Illinois business	23.01
Capital and surplus attributable to Illinois, being 23.01% of $1,571,974.93	351,711.03
Illinois capital and surplus debased to 30%	105,513.31
Tax rate for 1924	8.4 %
Tax on $105,513.30 computed at 8.4%	8,863.12
Tax for Cook County as fixed by court below (Printed Record, p. 29)	3,301.00

DUBUQUE FIRE AND MARINE INSURANCE COMPANY.

1925.

Total assets (53)	$4,241,332.15
Total liabilities (61)	2,632,804.13
Unearned premiums (61)	2,382,427.29
Paid up capital (61)	500,000.00
Surplus (61)	1,108,528.02
Capital and surplus (61)	1,608,528.02
Total net premiums (21)	1,858,998.22
Illinois premiums (99)	398,938.38
Percentage of Illinois business	21.15%
Capital and surplus attributable to Illinois, being 21.15% of $1,608,528.02	345,833.34
Illinois capital and surplus debased to 30%	103,750.02
Tax rate for 1925	9.05%
Tax on $103,750.02 computed at 9.05%	9,389.39
Tax for Cook County as fixed by court below (Printed Record, p. 30)	6,811.00

DUBUQUE FIRE AND MARINE INSURANCE COMPANY.

1926.

Total assets (53)	$4,615,001.50
Total liabilities (66)	2,906,293.96
Unearned premiums (66)	2,623,150.98
Paid up capital (66)	500,000.00
Surplus (66)	1,208,707.54
Capital and surplus (66)	1,708,707.54
Total net premiums (21)	2,409,668.93
Illinois premiums (105)	414,732.10
Percentage of Illinois business	17.2 %
Capital and surplus attributable to Illinois, being 17.2% of $1,708,707.54	293,897.69
Illinois capital and surplus debased to 30%	88,169.31
Tax rate for 1926	9.29%
Tax on $88,169.31 computed at 9.29%	8,190.92
Tax for Cook County as fixed by court below (Printed Record, p. 30)	4,849.00

MILWAUKEE MECHANICS INSURANCE COMPANY.

1924.

Total assets (53)	$9,620,091.35
Total liabilities (61)	5,886,059.10
Unearned premiums (61)	4,915,284.84
Paid up capital (61)	1,250,000.00
Surplus (61)	2,484,232.00
Capital and surplus (61)	3,735,232.25
Total net premiums (11)	4,711,153.21
Illinois premiums (99)	505,757.22
Percentage of Illinois business	10.75%
Capital and surplus attributable to Illinois, being 10.75% of $3,735,232.25	401,547.46
Illinois capital and surplus debased to 30%	120,464.24
Tax rate for 1924	8.4 %
Tax on $120,464.24 computed at 8.4%	10,118.89
Tax for Cook County as fixed by court below (Printed Record, p. 37)	3,603.00

MILWAUKEE MECHANICS INSURANCE COMPANY.

1925.

Total assets (55)	$10,395,019.94
Total liabilities (63)	6,716,025.88
Unearned premiums (63)	5,666,196.50
Paid up capital (63)	1,250,000.00
Surplus (63)	2,428,994.06
Capital and surplus (63)	3,678,994.06
Total net premiums (23)	5,596,949.36
Illinois premiums (101)	659,889.72
Percentage of Illinois business	11.96%
Capital and surplus attributable to Illinois, being 11.96% of $3,678,994.06	408,221.17
Illinois capital and surplus debased to 30%	122,466.35
Tax rate for 1925	9.05%
Tax on $122,466.35 computed at 9.05%	11,083.20
Tax for Cook County as fixed by court below (Printed Record, p. 35)	2,932.00

MILWAUKEE MECHANICS INSURANCE COMPANY.

1926.

Total assets (55)	$12,198,121.18
Total liabilities (68)	7,324,069.78
Unearned premiums (68)	6,164,239.94
Paid up capital (68)	2,000,000.00
Surplus (68)	2,874,051.40
Capital and surplus (68)	4,874,051.40
Total net premiums (23)	5,843,392.70
Illinois premiums (107)	685,218.24
Percentage of Illinois business	11.73%
Capital and surplus attributable to Illinois, being 11.73% of $4,874,051.40	571,726.19
Illinois capital and surplus debased to 30%	171,517.85
Tax rate for 1926	9.29%
Tax on $171,341.63 computed at 9.29%	15,933.09
Tax for Cook County as fixed by court below (Printed Record, p. 37)	3,957.00

NATIONAL FIRE INSURANCE COMPANY.

1924.

Total assets (53)	$36,044,151.77
Total liabilities (61)	22,171,802.69
Unearned premiums (61)	17,884,365.18
Paid up capital (61)	3,000,000.00
Surplus (61)	10,972,349.08
Capital and surplus (61)	13,972,349.08
Total net premiums (11)	17,718,342.35
Illinois premiums (99)	1,655,733.99
Percentage of Illinois business	9.34%
Capital and surplus attributable to Illinois, being 9.34% of $13,972,349.08	1,224,917.40
Illinois capital and surplus debased to 30%	367,475.22
Tax rate for 1924	8.4 %
Taxes on $367,475.22 computed at 8.4%	30,867.92
Tax for Cook County as fixed by court below (Printed Record, p. 38)	8,400.00

NATIONAL FIRE INSURANCE COMPANY.

1925.

Total assets (55)	$38,202,776.74
Total liabilities (63)	23,773,604.08
Unearned premiums (63)	19,324,218.17
Paid up capital (63)	3,000,000.00
Surplus (63)	11,429,172.66
Capital and surplus (63)	14,429,172.66
Total net premiums (23)	19,214,638.37
Illinois premiums (101)	1,886,668.70
Percentage of Illinois business	9.88%
Capital and surplus attributable to Illinois, being 9.88% of $14,428,172.66	1,385,602.25
Illinois capital and surplus debased to 30%	415,680.67
Tax rate for 1924	9.05%
Tax on $415,680.67 computed at 9.05%	37,519.50
Tax for Cook County as fixed by court below (Printed Record, p. 38)	9,231.00

NATIONAL FIRE INSURANCE COMPANY.

1926.

Total assets (57)	$41,377,484.18
Total liabilities (69)	26,703,531.64
Unearned premiums (69)	21,710,147.81
Paid up capital (69)	3,000,000.00
Surplus (69)	11,673,952.46
Capital and surplus (69)	14,673,952.46
Total net premiums (23)	22,304,633.61
Illinois premiums (107)	2,258,324.80
Percentage of Illinois business	10.13%
Capital and surplus attributable to Illinois, being 10.13% of $14,673,952.46	1,486,471.13
Illinois capital and surplus debased to 30%	445,941.33
Tax rate for 1926	9.29%
Tax on $445,941.33 computed at 9.29%	41,427.95
Tax for Cook County as fixed by the court below	10,497.00

As above stated the National Fire Insurance Company is one of the companies on whose behalf the present appeal is being prosecuted.

The foregoing figures are not to be understood as being mathematically accurate so far as the amounts of taxes for the respective years are concerned. It is impossible to make them so for the following reasons:

The figures representing the receipts, expenses, income, etc., are for the respective calendar years commencing January 1, while the taxes are for the tax years commencing May 1. So, too, the taxes fixed by the court below represent only the taxes for Cook County and do not include any for the remainder of the State. But as it is a well known fact that of the total insurance written in the State by the seventeen companies approximately 80% is written in Cook County, the figures above given demonstrate clearly that the net receipts taxes imposed upon the fire insurance companies are much less than would be imposed

upon them if they were taxed upon the portion of their capital used in their Illinois business. The percentage of Cook County business differs as to the different companies. Some companies receive more than 80% of their premiums in Cook County while others receive less.

Certainly, unless we are to say they should not contribute at all to the public revenue by way of taxes, there is no possible theory upon which it can be held that the tax imposed by the judgment of the court below was excessive.

The appellant, had it seen fit, could have shown the exact figures as to the percentage of its business each year ending April 30 transacted in Illinois, the proportion transacted in Cook County and all other figures necessary for the ascertainment of the exact facts. If the precise figures were necessary for the ascertainment of the justice of the tax the burden was upon appellant to show them.

Other interesting facts may be gathered from these reports among which are the following:

The total number of Illinois companies transacting business in Illinois in 1924 was 13. The total number of foreign companies was 242. The following figures relating to these companies are shown:

Page.		1924.
57	Total admitted assets of all companies	$1,604,171,308.88
49	Total admitted assets of Illinois companies	14,449,380.58
65	Paid up capital and surplus of all companies	677,359,811.84
58	Paid up capital and surplus of Illinois companies	8,482,855.05
27	Total premiums received by all companies in all states and countries	835,244,314.96

17	Total premiums received by Illinois companies in all states and countries	6,000,240.81
103	Total premiums received by all companies in Illinois	58,258,290.26
95	Total premiums received by Illinois companies in Illinois	1,640,269.19
	Percentage of Illinois business, transacted by Illinois companies	2.81%
	Percentage of Illinois business transacted by foreign companies	97.19%
56	Loans on bonds, mortgages and collateral and bonds and stocks owned by all companies	1,231,097,471.10
49	Loans on bonds, mortgages and collateral and bonds and stocks owned by Illinois companies	11,349,592.55

The total number of Illinois companies transacting business in Illinois in 1925 was 14. The total number of foreign companies was 253. The following is a statement showing the percentage of Illinois business transacted by Illinois companies and the percentage transacted by foreign companies:

1925.

105	Total premiums received in Illinois by all companies	$65,817,824.22
97	Total premiums received in Illinois by Illinois companies	1,562,920.23
	Percentage transacted by Illinois companies	2.37%
	Percentage transacted by foreign companies	97.63%

The total number of Illinois companies transacting business in Illinois in 1926 was 15. The total number of foreign companies was 250. The following is a statement showing the percentage of Illinois business transacted by Illinois

companies and the percentage transacted by foreign companies:

1926.

115	Total premiums received in Illinois by all companies	$67,753,787.31
103	Total premiums received in Illinois by Illinois companies	1,208,737.53
	Percentage transacted by Illinois companies	1.78%
	Percentage transacted by foreign companies	98.22%

Of interest also are the following statistics with respect to some of the leading American companies doing business in Illinois in 1924:

AETNA INSURANCE COMPANY OF HARTFORD.

Total admitted assets	$45,008,961.81
Capital and surplus	16,429,128.17
Total premiums received	24,946,215.62
Illinois premiums received	2,345,915.58
Percentage of Illinois premiums	9.42%
9.42% of capital and surplus	1,547,616.80

AMERICAN INSURANCE COMPANY OF NEWARK.

Total admitted assets	$22,252,507.69
Capital and surplus	7,683,817.57
Total premiums received	12,129,172.99
Illinois premiums received	1,746,223.69
Percentage of Illinois premiums	14.43%
14.43% of capital and surplus	1,087,508.00

AUTOMOBILE INSURANCE COMPANY OF HARTFORD.

Total admitted assets	$21,857,151.50
Capital and surplus	4,538,414.05
Total premiums received	30,085,492.65
Illinois premiums received	1,685,756.31
Percentage of Illinois premiums	5.62%
5.62% of capital and surplus	255,168.76

CONTINENTAL INSURANCE COMPANY OF NEW YORK.

Total admitted assets	$57,462,940.10
Capital and surplus	20,744,601.97
Total premiums received	20,889,037.44
Illinois premiums received	1,705,580.64
Percentage of Illinois premiums	8.15%
8.15% of capital and surplus	1,690,685.06

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD.

Total admitted assets	$78,027,872.42
Capital and surplus	15,483,771.34
Total premiums received	56,384,485.51
Illinois premiums received	3,114,592.01
Percentage of Illinois premiums	5.52%
5.52% of capital and surplus	854,694.15

HOME INSURANCE COMPANY OF NEW YORK.

Total admitted assets	$84,980,279.11
Capital and surplus	37,499,861.96
Total premiums received	46,596,815.39
Illinois premiums received	2,196,942.68
Percentage of Illinois premiums	4.71%
4.71% of capital and surplus	1,766,243.48

INSURANCE COMPANY OF NORTH AMERICA.

Total admitted assets	$53,667,924.28
Capital and surplus	24,042,045.99
Total premiums received	28,441,553.21
Illinois premiums received	1,977,796.86
Percentage of Illinois premiums	6.99%
6.99% of capital and surplus	1,680,532.87

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD.

Total admitted assets	$36,044,151.77
Capital and surplus	13,972,349.08
Total premiums received	17,718,242.35
Illinois premiums received	1,655,733.09
Percentage of Illinois premiums	9.34%
9.34% of capital and surplus	1,304,817.40

Thus there are eight of these foreign fire insurance companies each of which collects more premiums in Illinois than do the entire thirteen Illinois companies and there are four Hartford companies which collect in Illinois $8,801,996.99, whereas the Illinois companies only collect $1,640,269.19.

We have not deemed it necessary to add to the length of our argument figures covering the entire five years now in question. If the figures for 1924, 1925 and 1926, which we have above given are not fairly representative of the entire five years counsel for appellant can say so and supply the additional facts which they consider material.

When we consider the immense amount of money which those companies take out of the State in the form of unearned premiums and keep on hand for investment until they are called upon to pay losses it would seem plain that they should be subjected to some method of taxation. Unless the court can point out some more equitable method it will not be in a position to condemn the net receipts tax now in question as being unjustly discriminatory as between domestic fire insurance companies and foreign fire insurance companies.

Finally upon this point, if appellant insists upon a strict and accurate assessment which will secure perfect equality, we suggest that a foreign fire insurance company, when it becomes what Chief Justice Taft calls a *quasi* citizen of Illinois, be taxed as any domestic fire insurance company which is a simon pure citizen, that is upon the value of all its property no matter where situated.

V.

A fairer method of taxing the foreign insurance companies would be a capital stock tax.

As already suggested (*ante*, p. 24), no injustice would result to the insurance company by applying the tax rate to such a proportion of its capital stock and surplus as its Illinois premiums bear to its total premiums. Another method would be to apply the tax rate to such a proportion of the market value of its capital stock as its Illinois premiums bear to its total premiums.

The taxation in Illinois of a domestic fire insurance company is based upon the value of its capital stock including its good will. If one of these foreign fire insurance companies, such for instance as the National Fire Insurance Company, were so taxed it would be taxed upon the value of its entire capital stock, which would include the value of its good will, not withstanding 90 per cent of its total premium receipts were received from business outside of the State of Illinois. That company is a Connecticut corporation, its home office being at Hartford. We may safely assume that its full value assessments made in that state fairly represented the values of its capital stock.

We have not been able to ascertain the company's full Connecticut assessments for all of the years now in question, but have ascertained those for the years 1926 and 1927. They were $20,700,000 in 1926 and $25,350,000 in 1927. The capital and surplus amounted to $14,673,952.46 in 1926 and to $17,525,817.16 in 1927 (Insurance Report for 1927, p. 64).

Comparing the actual capital and surplus in each of these years with the full value Connecticut assessment for the same years the results would be as follows:

1926

Illinois Assessment on 10.13% of $14,673,952.46 of capital and surplus debased to 30% ..... $ 445,941.33
Connecticut assessment on 10.13% of $20,700,000 debased to 30% ..... $ 629,073.00

1927

Illinois assessment on 10.9% of $17,525,817.16 of capital and surplus debased to 60% $1,146,188.40
Connecticut assessment on 10.9% of $25,350,000 debased to 60% $1,657,890.00

The excess of the Connecticut assessments over and above the capital stock and surplus represents *good will*. The good will does not represent merely *Connecticut* good will. Part of it is the good will which the company enjoys in *Illinois* which in 1926 was 10.13% and in 1927 was 10.9%.

VI.

In determining whether the tax on net receipts is illegally discriminatory, the privilege tax imposed by the Act of 1919 must be ignored.

In the *Hanover Case*, 272 U. S. 510, 511, the court said:

> "With respect to the 'admission fee,' so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal

and is to be classified with domestic corporations of the same kind."

Under the privilege tax act of 1919 the admission fee was fixed at 2% of the gross premiums less deductions of returned premiums, or, in other words, net premiums. The Illinois Legislature might have fixed this "admission fee" at 6% of the net premiums, and had it done so, the admission fees paid by appellant for the years 1924, 1925 and 1926 would have been approximately as follows:

For 1924, 6% of $413,694.43	$24,821.66
For 1925, 6% of $366,432.52	21,985.95
For 1926, 6% of $275,031.47	16,501.88

The taxes fixed by the court below for these years were as follows:

For 1924	$3,528.00
For 1925	4,072.00
For 1926	2,694.00

These figures, of course, are not mathematically accurate for the reasons already stated (*ante*, pp. 31-32), but they are sufficiently so for purposes of illustration. They show quite plainly the futility of any attempt of these foreign fire insurance companies to evade the payment of such taxes as the Illinois Legislature may consider fair and just regardless of what may be the views of the courts. If these companies should be dissatisfied with treatment they receive they will not be obliged to transact business in Illinois. It is to the advantage of the property owners of Illinois that foreign companies should do business in the state and that is a sufficient guaranty that they will receive fair treatment, and the fact that over 200 of them have transacted business in Illinois for fifty years and 190 of them are content to pay their taxes is quite convincing evidence that the taxes are not unjust.

Furthermore while the insurance companies deliver the tax money to the collectors the real taxpayers are those who buy the insurance. As is well known tax rates are given consideration when their premium rates are fixed by the companies and approved by the superintendents of insurance. Appellant has received from its policyholders the taxes for the years in question and has received the income from the money thus received from four to seven years.

VII.

Permitting casualty companies to do some of the kinds of business done by fire insurance companies cannot be given the effect of invalidating Section 30 of the Act of 1869.

Down to 1899, which was 30 years after Section 30 of the Act of 1869 went into effect, there was no statute in Illinois authorizing any other than fire, marine and inland navigation insurance companies to engage in any of the kinds of insurance now in question. By acts passed in 1879 and 1885, in addition to fire, marine and inland navigation insurance, these companies were also authorized to engage in insurance against loss by lightning, tornadoes, wind storms, hail storms and cyclones. That was the situation when the Casualty Insurance Company Act was adopted in 1899. Prior to that time the question of discrimination was one solely between the domestic fire insurance companies and the foreign fire insurance companies. According to the decision in the *Hanover Case*, 272 U. S. 473, there was then no unlawful discrimination in favor of the domestic companies which were taxed upon their capital stock, including the property in which their net receipts were invested, and against the foreign compa-

nies which were taxed on their net receipts but not upon their capital stock.

The question then is, does the fact that the legislature subsequently in the Casualty Insurance Act authorized foreign casualty companies to transact some of the same kinds of business authorized to be transacted by foreign fire insurance companies but failed to provide that the casualty companies should be taxed upon their net receipts from such business render unconstitutional Section 30 of the Act of 1869?

This question must be answered in the negative for several reasons.

First. Foreign fire insurance companies being engaged in business only a small part of which is engaged in by casualty companies, and being differently organized, there may be reasons for taxing them on some of the classes of receipts which casualty companies receive which do not exist with respect to casualty companies. Without evidence showing all the circumstances the court could not, as a matter of law, say that the omission to tax the receipts of the casualty companies produced illegal discrimination. A correct decision would require the court to be put in possession of knowledge of all the circumstances the legislature had to consider when they passed the law. No proof whatever is offered by appellant upon this question.

Second. The Fourteenth Amendment was not enacted for the sole benefit of foreign corporations. While it forbids unjust discrimination in favor of domestic corporations, and against foreign corporations, it likewise forbids unjust discrimination in favor of foreign corporations and against domestic corporations. The court having de-

cided in the *Hanover Case* that the net receipts tax, when extended upon a proper assessment, produces substantial equality between domestic and foreign fire insurance corporations it follows that relieving the foreign fire insurance corporations of the tax will result in substantial inequality to the disadvantage of the domestic fire insurance corporations and thus deprive them of the equal protection of the laws.

Third. Some form of taxation of foreign fire insurance companies is required not only to secure equality, or approximate equality, of treatment as betwen them and domestic fire insurance companies, but also to secure equality, or approximate equality, of treatment to all other taxpayers. Equality of treatment is the constitutional right of all taxpayers, whether they are insurance companies, other corporations or individuals. While the methods of taxation of domestic fire insurance companies, on the one side, and other domestic corporations and individuals, on the other side, are different, they are supposed to result in equality and are so treated.

Assuming, then, that the net receipts tax results in equality as between domestic fire insurance companies and foreign fire insurance companies, it also results in equality as between the foreign fire insurance companies on the one side, and individuals on the other side. Declaring the net receipts tax void, therefore, must result of depriving all individual taxpayers of the right of equality of taxation to which the Fourteenth Amendment entitles them.

Fourth. When there is in force a valid law resulting in substantial equality of taxation and a subsequent law is passed which, if given effect, would destroy that substantial equality, it is the new law and not the old law which should be declared unconstitutional.

Is there any obstacle, constitutional or otherwise, in the way of the adoption of such a course? Whether a law is in violation of the Fourteenth Amendment must be determined by what will be its effect. If, when construed in connection with other laws in force at the time it is enacted, the operation of a subsequent law will result in a violation of the Fourteenth Amendment, how can it be treated as a valid law?

Suppose that any state should pass a law authorizing a foreign corporation to come into the state and transact business in competition with domestic corporations of the same kind. Suppose that law should make no provision for taxing the foreign corporation upon its business so transacted or otherwise although the domestic corporations are taxed upon their business by being taxed upon their capital stock. Suppose a domestic corporation should appear in this court demanding relief under the equal protection clause of the Fourteenth Amendment and ask to have the law declared invalid? What would the court say?

Could the court, with a reasonable regard for consistency, say that although the taxation of a foreign corporation in a particular manner results in equality of treatment of a domestic company, the state is at liberty to omit that taxation altogether and thus dispense with such equality?

The court in the *Hanover Case* decided that taxing foreign fire insurance companies upon their net receipts, when the tax rate was computed upon the same basis of value applied in taxing other property did not result in inequality. If equality results from the tax it follows that abolishing the tax would result in inequality and it would make no difference whether the tax were abolished

by an express repeal of the taxing law or by the enactment of some other law which did not mention the tax but operated as a repeal by implication. *In this case no repeal by implication can be claimed inasmuch as the privilege Tax Act of 1919 expressly provides that it shall not affect the tax provided for by Section 30 of the Act of 1869.*

Fifth. As casualty insurance companies are different from fire insurance companies in their organization and in their methods of transacting business, those differences may justify differences in methods of taxation. It was incumbent upon appellant in any event to bring before the court all the facts relating to the organization of these companies, their methods of transacting business, the amount of their business, the profits derived therefrom, their unearned premiums and what disposition was made of them and all other facts which might shed light upon the justice or injustice of a tax upon their net receipts.

Appellant, however, contents itself with merely showing such casualty insurance companies are in existence and are doing business in Illinois, a part of which fire insurance companies are authorized to transact. This is not enough. It was the duty of appellant, if it contended that the law in its practical operation was unjustly discriminatory against casualty insurance companies, to prove that fact by evidence. This follows from the court's previous decisions.

Lindsley v. *National Carbonic Gas Co.*, 220 U. S. 61.

Quong Wing v. *Kirkendall*, 223 U. S. 58, 59.

Citizens Nat. Bk v. *Dunn*, 257 U. S. 99.

Interstate Busses Corp. v. *Holyoke*, 273 U. S. 45.
Weaver v. *Palmer Bros. Co.* 270 U. S. 402.
Minnesota Rate Cases, 230 U. S. 352.

VIII.

Permitting casualty companies to do some of the kinds of business done by fire insurance companies cannot be given the effect of relieving foreign fire insurance companies from the payment of the net receipts tax on their receipts from the kinds of business done by casualty companies.

The main purpose sought to be accomplished by appellant by the prosecution of this appeal is to secure a decision of this court that while foreign fire insurance companies may be taxed under Section 30 of the Act of 1869 on their net receipts from fire, marine and inland navigation insurance, they cannot be taxed on their net receipts from automobile insurance and insurance against losses by tornadoes, windstorms, hail and sprinkler leakage. But such a result is inadmissible.

According to the decision in the *Hanover Case* the taxation of the foreign fire insurance companies on their net receipts from fire, marine and inland navigation insurance put them upon a level with domestic fire insurance companies, and, of course, it also put the domestic companies upon a level with the foreign companies. If such taxation had not been imposed upon the foreign companies the domestic companies would have been discriminated against and the foreign companies would have been given an advantage forbidden by the Fourteenth Amendment.

Now the same requirement of equality which justified the taxation of the foreign fire insurance companies upon their net receipts from fire, marine, and inland navigation

insurance required that they should be taxed upon their net receipts from the additional kinds of insurance. The domestic companies were taxed upon their net receipts from such insurance, or what they were invested in, just as they were upon their receipts from fire insurance, either through their capital stock tax or otherwise, and hence not to have taxed the foreign companies on their receipts therefrom would have been unjustly discriminatory against the domestic companies. It would have deprived the domestic companies of the equal protection of the laws.

IX.

The complaint that non-incorporated companies, individuals, and Lloyds were not taxed on their net receipts is of no force.

Non-incorporated companies are not corporations, but merely associations of individuals and only taxable as individuals. No capital stock tax can be imposed upon them. If they are residents of this state they are assessed and taxed as other individuals are assessed and taxed. If they are non-residents and merely transact business in this state through agents their agents are assessed and taxed in the same manner as agents of other individuals are assessed and taxed. There is the same difference in respect to taxation between these individuals and incorporated fire insurance companies that there is between other individuals and other incorporated companies.

In *Roach & Co.* v. *Harding*, 348 Ill. 454, the court held that an association such as an insurance exchange was not a corporation but was a legal entity and that the agent having actual control of its credits which were intangible,

or of its tangible personal property, was required to list them for taxation.

To impose a net receipts tax upon an individual resident in the state in addition to a property tax, while imposing only a property tax upon a domestic fire insurance company, would be a clear violation of the Fourteenth Amendment.

A law imposing a tax upon an individual who was a non-resident of the state when the same kind of a tax was not imposed upon a resident individual would likewise be unconstitutional. It would violate Section 2 of Article IV of the United States Constitution.

Allgeyer v. *Louisiana*, 165 U. S. 578.

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 34.

Barnes v. *People*, 168 Ill. 425.

The facts relied upon as to these non-incorporated companies, individuals, Lloyds, etc., are embodied in a stipulation (Printed Record, pp. 98, 99), which recites that during the years in question they were engaged in transacting fire, marine and inland navigation insurance in competition with the foreign fire insurancee ompanies, and that

> "said non-incorporated foreign associations, individuals, Lloyds and domestic insurance corporations during said years *were not assessed for taxation upon their several net receipts covering fire, marine and inland navigation insurance risks* assumed by them in Illinois, or *upon any real or personal property other than net receipts* like all other property owners and taxpayers, and that said foreign stock fire insurance companies were assessed for taxation upon their net receipts derived from such competitive business; that foreign casualty companies also carried on such competitive business *and were not taxed on their net receipts derived therefrom.*"

It will be observed that these allegations fail to allege the following:

1. That these non-incorporated companies, etc. *had any net receipts* from such fire, marine and inland navigation business which were subject to taxation.

2. That these non-incorporated companies *had any real or personal property, other than net receipts,* subject to taxation.

Furthermore, it is nowhere shown *why,* if they had any such net receipts or real or personal property, they were not assessed and taxed thereon. If they had any such property the failure of the assessing officers to assess and tax it may have been the fault of such assessing officers or the fraud of such non-incorporated companies.

If, as a matter of fact, these non-incorporated companies, including Lloyds, did acquire any net receipts from fire insurance, appellant should have made proof of that fact, together with the amounts received. The amounts received, if any, may have been so small as to have come within the maxim *de minimis non curat lex.* Appellant did insert in its Appendix (pp. 69-70) a table of receipts of casualty companies from motor vehicle insurance and sprinkler leakage insurance, but none from fire, marine and inland navigation insurance.

Appellant states that these non-incorporated companies, during the years in question, were *lawfully* carrying on fire, marine and inland navigation insurance business. They could only *lawfully* do this by complying with the following provisions of the Act of 1911 (Laws of 1911, pp. 371-373) which was in force during these years and Section 4 of which provided as follows:

"Every association, partnership, individual or aggregation of indiivduals, so assuming liability upon property not owned by its members shall, so far as the same shall be applicable to the business transacted, be subject to the *same* requirements, fees and *taxes* except as to capital stock and deposits, *as are by law imposed upon corporations engaged in the same or similar business in this State.*"

The passage of a law for taxing these non-incorporated companies in accordance with the same requirements as those imposed upon corporations engaged in the same or similar business would necessarily relieve the law in question from the objection that it violated the Fourteenth Amendment even if the law were not obeyed. *A tax law cannot be overturned simply because some persons escape taxation although the law requires them to be taxed.*

X.

The question of the omission to tax casualty companies does not affect the taxes for the years 1923 to 1926, inclusive.

The evidence (Printed Record, pp. ....) shows that the returns made by the insurance companies for the years 1923 to 1926, inclusive, included only premiums from fire, marine and inland navigation insurance. Consequently appellant cannot complain that Section 30 of the Act of 1869 is invalid because casualty companies were not taxed even if otherwise such complaint would be valid.

Furthermore, appellant and the other seventeen complaining companies made their returns voluntarily and asked for their acceptance by the Board of Review (Printed Record, p. 7). While the Board of Review refused to accept them the court below held them valid and fixed the taxes accordingly. Its judgment as to the taxes

for those years must therefore be upheld unless Section 30 of the Act of 1869 is unconstitutional however construed.

XI.

The opinion of the Supreme Court of Illinois in People ex rel. v. Fayart is of no weight as authority in the instant case.

An opinion of the Supreme Court of Illinois, which that court subsequently repudiated, is, of course, of no force. A statement of facts in reference to the *Fayart Case,* however, is justified in view of what is said about it in appellant's brief (pp. 47, 48). The facts as to that case, briefly stated, are as follows:

In 1924, at about the same time that the Hanover Fire Insurance Company and ten other foreign fire insurance companies filed their bills in chancery in the Superior Court of Cook County to enjoin the net receipts tax for the year 1923, the People of the State of Illinois instituted an original action in the Supreme Court of Illinois for a mandamus to compel an agent of a foreign fire insurance company to make returns of the company's net receipts as required by Section 30 of the Act of 1869. The real purpose of that suit was to secure from the Supreme Court of Illinois a decision as to what deductions should be made from gross receipts in ascertaining net receipts.

From the decision in *People* v. *Barrett,* 309 Ill. 53, Mr. Justice Duncan had dissented without stating the grounds of his dissent. As subsequently appeared, however, from his dissenting opinion in *Hanover Fire Insurance Company* v. *Carr,* 317 Ill. 366, the ground of his dissent was that "net receipts" in Section 30 of the Act of 1869 meant "net annual gains or net profits," which, of course, would mean

gross receipts after deducting not only operating expenses but also fire and other losses. The *Fayart Case* and *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, both came before the Supreme Court of Illinois at the October Term, 1924. In the division of the business of the court the preparation of an opinion in the *Fayart Case* was assigned to Mr. Justice Duncan, while the preparation of the opinion in *Hanover Fire Insurance Company* v. *Carr* was assigned to Mr. Justice Stone and the opinion prepared by him was duly filed on April 24, 1925.

On June 22, 1927, after the reversal by this court in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, of the decision of the Supreme Court of Illinois in *Hanover Fire Insurance Company* v. *Carr*, the Supreme Court of Illinois, under this court's remanding order, filed its opinion *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, overruling its prior decisions in the *Kent* and *Barrett Cases* and sustaining the validity of Section 30 of the Act of 1869 when construed as authorizing a tax extended upon the net receipts assessed upon the same basis of value as other personal property. Mr. Justice Duncan was one of the four judges concurring in that decision.

Acting under that decision the assessments now in question were made by the Board of Review and, the taxes being extended thereon, actions at law, including the 17 now before this court, were brought against 208 foreign fire insurance companies to recover the taxes. Shortly after the commencement of these suits negotiations were entered into between the representatives of the taxing bodies and the insurance companies for the settlement of those suits and those negotiations had resulted on December 16, 1928, in an agreement between the attorneys for the respective parties to advise

the settlement of the litigation by the payment by the insurance companies of substantially 50 per cent of the taxes. Two days later, however, to the surprise of all parties, a 40-page opinion, written by Mr. Justice Duncan, was filed in the *Fayart Case,* declaring Section 30 of the Act of 1869 to be in violation of the 14th Amendment.

There was no dissent from that opinion. Immediately, upon behalf of the petitioner in that case, a petition for rehearing, consisting of 81 pages, was filed in the action. At the February Term, 1929, the court struck the petition from the files for reasons not stated, but probably because it violated the court's rehearing rule, and, immediately after having done so, granted a rehearing of the court's own motion. The petitioner, the People of the State of Illinois, thereupon, as it had a right to do, dismissed the petition and that ended that particular case. Shortly after the dismissal of the opinion, negotiations were renewed between the attorneys of the respective parties, with the result that, as to 190 of the 208 foreign fire insurance companies, the tentative agreement for settlements on the basis of the payment of approximately 50 per cent of the taxes were carried through, the taxes were paid and those companies have complied with Section 30 of the Act of 1869 in subsequent years.

The reason for the dismissal of the petition for a mandamus by the petitioner was that the court, taking into account its former decisions and disregarding its decision in the *Fayart Case,* stood four to three in favor of sustaining the law, but one of the four, Mr. Justice Duncan, was of the opinion that net receipts should be construed as net profits ascertained after deducting from gross receipts both operating expenses and other losses, which construction made the law of practically no value.

The court in the *Fayart Case,* having stricken the petition for rehearing from the files, and under its rules there being no right on the part of the parties to file additional arguments, and the arguments already on file not having discussed the questions relating to the constitutionality of the law, the taxing bodies deemed it prudent not to run the risk of a decision by the court in that case, but rather to wait until a future case would arise when the questions involved could be fully argued.

The disposition of the *Fayart Case* was followed by the decision in *People* v. *Franklin National Insurance Company,* 343 Ill. 326, in which the constitutionality of the Act of 1869 was unanimously sustained. That was followed by the decision in the *Concordia Case* now before the court. The opinion in both cases were concurred in by all the judges, including those that dissented in *Hanover Fire Insurance Co.* v. *Carr,* 317 Ill. 366, and in *Hanover Fire Insurance Co.* v. *Harding,* 327 Ill. 590.

XII.

The taxes for the year 1927 are valid.

Counsel for appellant (Brief, pp. 45-46) say:

> "The method of making the 1927 assessment in 1928 was the following:
>
> "The Board of Review took the gross receipts returned, and instead of deducting the actual operating expenses shown under oath by appellant's return (in the case of appellant 54% of gross receipts), deducted 30% of the aggregate gross receipts to cover operating expenses and extended the remainder without debasement, scaling or equalization as the estimated net receipts for the year 1927."

This same statement, in substance, was made in the brief for appellant in the Supreme Court of Illinois and was

there so clearly shown to be untrue that it was abandoned by appellant's counsel and, for that reason, was not noticed in that court's opinion. The real facts were as follows:

The taxing bodies claimed before the Board of Review that appellant's gross receipts returns were about 25% less than they should have been had not appellant omitted from its return all gross receipts other than those from fire, marine and inland navigation insurance. The Board of Review held this claim to be good and therefore treated appellant's gross receipts returned as being only 75% of what they should have been, or, in other words, treated the amount of the gross receipts returned as being what the actual gross receipts would be when properly debased and equalized.

The debased and equalized gross receipts having been thus arrived at there was deducted therefrom 30% on account of expenses, that being the percentage which the Board had previously fixed. The evidence showed that was sufficient to cover the agents' commissions, the agents paying their own expenses (Printed Record, pp. 101, 104).

In other words, the Board, being satisfied there was an omission from the return of receipts which should have been returned and not being able to secure any information from appellant as to the exact amount, estimated the deficiency to amount to a proper debasement and equalization. The Board might, under the law, have penalized appellant to the extent of 50 per cent had they seen fit to do so because of appellant's refusal to make a proper return.

At the time the assessment proceedings took place it was the settled rule that a property owner who, when

called upon to give the Board necessary information which it called for, refused to do so, could not complain that the assessment was excessive, and that, in any event, a property owner who refused to furnish the necessary information could not complain of an excessive assessment without making affirmative proof of the actual value of the property assessed. *Pratt* v. *Raymond*, 188 Ill. 469; *Earl & Wilson* v. *Raymond*, 188 Ill. 15; *American Express Co.* v. *Raymond*, 189 Ill. 232; *Leper* v. *Pulsifer*, 37 Ill. 110; *Cummings* v. *Weber*, 218 Ill. 521; *Adsit* v. *Leib*, 76 Ill. 198; *Peirce* v. *Carloch*, 224 Ill. 608; *Sanitary District* v. *Young*, 285 Ill. 351; *Jeffery Apartment Building Corporation* v. *Harding*, 347 Ill. 336, 341.

In appellant's brief (p. 49) it is also said:

> "Once the net receipts were arrived at by any method, appellant was entitled to have the calculated amount debased to 60 per cent like all other personal property in Cook County for the year 1927."

This is fully answered by the uniform ruling of the Supreme Court of Illinois that one who refuses to furnish the information required by the assessor can have no relief from an excessive assessment without proving actual fraud and supplementing that proof by proof of the actual value of the property assessed. Such proof could not be made by a sworn return not made in compliance with law. Besides, as already stated, the evidence shows that the only receipts returned were those from fire, marine and inland navigation insurance.

Excessive valuation of property cannot be established without proof of what the value actually was.

Sanitary District v. *Young*, 285 Ill. 351.

Jeffery Apartment Bldg. Corp. v. *Harding*, 347 Ill. 336, 341.

Conclusion.

We respectfully submit that the objections made by appellant to the judgment of the Supreme Court of Illinois are not well taken and that its judgment should be affirmed.

THOMAS J. COURTNEY,
LEON HORNSTEIN,
LOUIS H. GEIMAN,
HARRIS F. WILLIAMS,
HIRAM T. GILBERT,
Counsel for Appellee.

APPENDIX.

I.

Assignments of error in Hanover Fire Insurance Company v. Harding, 272 U. S. 494.

And now comes the Hanover Fire Insurance Company, a corporation, plaintiff in error in the above entitled cause, and avers and shows that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Illinois in the above entitled cause, the Supreme Court of the State of Illinois erred to the grievous injury and wrong of the plaintiff herein, and to the prejudice and against the rights of the plaintiff in error in the following particulars, to-wit:

(1) The Supreme Court of the State of Illinois erred in adjudicating and deciding that Section 30 of an act of the General Assembly of the State of Illinois entitled, "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois," approved and in force March 11, 1869, as amended by an act approved May 31, 1879, in force July 1, 1879, was and is a good and valid enactment and was and is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States;

(2) The Supreme Court of the State of Illinois erred in denying the claim of plaintiff in error that said Section 30 was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States which provides:

(fol. 175) "Nor shall any state * * * deny to any person within its jurisdiction, the equal protection of the laws,"

in that plaintiff in error, being a corporation, organized under the insurance laws of the State of New York and transacting its business of insurance in the State of Illinois after having paid to said State of Illinois a privilege tax for such purpose, and secured the license, permission and authority of the State of Illinois so to transact said business of insurance, was subject to a tax on its business of insurance while domestic insurance corporations of the State of Illinois, casualty insurance companies organized under the laws of the State of Illinois and under the laws of foreign states and governments, and doing business in the State of Illinois, partnerships, Lloyds, individuals and other insurers doing identically the same kind of business of insurance as plaintiff in error, were and are not subject to a tax on the business of insurance conducted by such other insurers, respectively:

II.

Extracts from bill of complaint in Hanover Fire Insurance Company v. Harding, 272 U. S. 494.

"(9) A. That the complainant is a corporation with capital stock and is authorized and empowered by its charter and articles of incorporation to insure those having insurable interest in (a) property, (whether upon land or water), (b) rents, and use and occupancy, (c) against hazards of fire, lightning, hail, tempest, earthquake, explosion (except upon steam boilers, and pipes, fly wheels, engines and machinery connected therewith or operated thereby), water, breakage, leakage, risks o focean, lake, river, canal and inland (fol. 16) navigation, transportation, hazards of windstorms, tornadoes, cyclones, transportation and, in addition,

upon automobiles or motor vehicles, against the hazards of theft and collision;

"That complainant, during the year ending April 30, A. D. 1923, exercised its said corporate powers aforementioned in the State of Illinois, and collected and received premiums upon policies of insurance by it written through its said Cook County agencies, as aforesaid, and against the risks, as aforesaid, which said action of it, the complainant, was in nowise prohibited by the said State of Illinois and was consistent with the laws and policy of said State;

"B. That the statutes of the State of Illinois provide for the chartering and organizing under the laws of said State of fire, marine and inland navigation insurance companies having their domicile in the State of Illinois (hereinafter referred to as domestic fire insurance companies), which said domestic fire insurance companies are authorized and empowered to organize as stock companies issuing capital stock to shareholders: that domestic fire insurance companies are authorized and empowered by the laws of the State of Illinois, and at all the times above mentioned were authorized and empowered, to make insurance on the same kinds and character of property and against the same hazards and risks as foreign fire insurance companies; that during all of said time, from the 1st day of May, A. D. 1922, to and including the 30th day of April, A. D. 1923, both domestic fire insurance companies and foreign fire insurance companies made insurance in the State of Illinois upon property against the hazards and risks, as aforesaid, and upon the same character of hazards and risks; that domestic fire insurance companies and foreign fire insurance companies charged, demanded and received (fol. 17) and during all of said period mentioned did charge, demand and receive the same, or approximately the same, premium as foreign fire insurance companies charged, demanded and received for insurance upon the same property, or for the same kind, form, character, or type of hazard or risk; that foreign fire insurance companies are in direct competition with domestic fire insurance companies in making insurance upon prop-

erty and against the hazards and risks hereinbefore stated;

"C. That the statutes of the State of Illinois provide for the chartering and forming of companies with capital stock for the purpose of doing a casualty insurance business (which companies so organized and domiciled within this State are hereinafter referred to as domestic casualty insurance companies); and for the licensing of casualty insurance companies with a capital stock, organized under the laws of foreign States and Governments (hereinafter referred to as foreign casualty insurance companies) to transact the business of casualty insurance; that casualty insurance companies, both domestic and foreign, are authorized to, and do, in the State of Illinois, and during all of the period aforementioned did, within the said State, make insurance, among other things, upon automobiles or other motor vehicles, whether stationary or being operated under their own power, against all or any—the risks of fire, lightning, windstorm, tornadoes, cyclones, explosions, hailstorms, transportation by land or by water, theft and collision; and did also make insurance, and still do, against loss or damage by water, caused by the breakage or leakage of sprinklers, pumps or other apparatus, water pipes (fol. 18), plumbing or other fixtures erected, used, or put in position for the purpose of extinguishing fires; against damage, loss or injury resulting from any cause whatsoever, from such sprinklers, pumps or other apparatus erected, used, or put in position for the purpose of extinguishing fires; to make insurance upon growing crops, live stock or other property against loss or damage by lightning, windstorms, hailstorms, and cyclones;

"That the powers so exercised and the authority so granted and the hazards so assumed by casualty insurance companies, domestic and foreign, are and each of such powers, authorizations and the insurance against such hazards respectively are and, during the period of one year prior to April 30, 1923, were exercised in the State of Illinois by complainant and by other foreign fire insurance companies; that casualty insurance companies, both domestic and foreign, do, and

during said entire period mentioned did, charge, demand and receive the same, or approximately the same, premiums as foreign fire insurance companies do and did charge, demand and receive for a like amount of insurance upon like property and upon like hazards of the kind above mentioned; that foreign fire insurance companies, including the complainant, are, and during said period mentioned were, in direct competition with casualty insurance companies, both domestic and foreign, in the business of making insurance on property of the kind, form, character, types and hazards described in this clause of this paragraph;

"That the aggregate amount of premiums received by complainant (fol. 19) and other foreign fire insurance companies for and on account of insuring property of the kind, form, and character and of the types and hazards in this clause of this paragraph referred to (and which may also be insured by casualty insurance companies, both domestic and foreign) constitutes a large and substantial percentage and part of its and their receipts in the State of Illinois and within the said County of Cook and Town of South Chicago collected by its and their respective agencies there being; that the aggregate amount of premiums received by casualty insurance companies, both domestic and foreign, for and on account of insuring property of the kind, form and character and of types and hazards in this paragraph referred to (and which may also be insured by foreign fire insurance companies) constitutes, and did constitute, a large and substantial percentage of the net receipts of casualty insurance companies, domestic and foreign, collected by their respective agencies established in the State of Illinois within the said County and town aforesaid; that during the year ending April 30, 1923, there were approximately 147 foreign casualty insurance companies licensed to do business in the State of Illinois, and during said time actually transacting business under said licenses within the State of Illinois; that among other things which may be insured, and during the said year ending April 30, 1923, were insured by foreign fire insurance companies and likewise insured by casualty insurance

companies domestic and foreign; are and were automobiles or other motor vehicles, stationary or operated under their own power, which were insured respectively by foreign fire insurance (fol. 20) companies and casualty insurance companies, both domestic and foreign, against risks and hazards of windstorms, tornadoes, cyclones, explosions, hailstorms, transportation by land or by water, theft or collision; that during said term there were approximately 950,000 automobiles and motor vehicles in the State of Illinois, and registered in the office of the Secretary of State under the provisions of the Motor Vehicle Law, a large part of which were located in the County of Cook and said Town of South Chicago; that foreign casualty insurance companies for the year A. D. 1923 received upwards of the sum of One Million Dollars in gross premiums for the insurance of automobiles and other motor vehicles against the risk of collision; that the complainant is informed and believes and so states the fact to be that foreign casualty companies doing business in the State of Illinois additionally received, during the year 1923, a sum not less than said sum so last mentioned in gross premiums for other types of insurance which they are so authorized to, and permitted to, and during said period of one year did, write by concurrent authority and power and by like permission of the State of Illinois so given to foreign casualty insurance (fol. 21) companies and so given to foreign fire insurance companies;

"That in a certain action instituted upon the relation of the City of Chicago, a municipal corporation, petitioner by an action for a mandamus against the members of the Board of Review of Cook County, Illinois, which said cause was No. 13899 in the Supreme Court of Illinois, the opinion of the court wherein is reported in Vol. 309 of the official reports of the decisions of the Supreme Court of Illinois at page 53 thereof, the said court did undertake to review and consider the nature and character of the tax undertaken to be imposed by said Section 30, and in which proceeding the constitutionality of said Act was not involved, nor was the complainant, or any other foreign fire insurance

company, any party thereto; that in the opinion in said cause rendered, the said Supreme Court did construe said Section 30 to be a business tax and not to be a privilege tax;

"That in and by said decision and other decisions of the Supreme Court of Illinois the said court did construe said Section 30 to impose a tax upon insurance when such insurance was, and is, written, placed and done by foreign fire insurance companies and to exempt from any tax thereunder insurance when written by any other insurers, whether domestic fire insurance companies, domestic or foreign (fol. 23) casualty insurance companies, by individuals, associations of individuals and groups of individuals or by groups of persons styling themselves Lloyds associations, or by any other entity whether natural or corporate;

"(11) That said Section 30 affords no warrant or authority for the assessment, extension or collection of said tax and is illegal, unconstitutional and void and of no force and effect, in that it violates Section 1 of Article IX of the Constitution of the State of Illinois, in that it is not a tax by general law, uniform as to the class upon which it operates;

"That it is in violation of Section 2 of Article II of the Constitution of the State of Illinois, because it deprives the complainant of liberty and deprives the complainant of property without due process of law;

"(12) That said Section 30 affords no warrant or authority for the assessment, extension or collection of said tax and is illegal, unconstitutional, void, and of no force and effect, in that it violates Section 1 of Article XIV of the Constitution of the United States, in that it denies to complainant the equal protection of the laws, and deprives it of liberty and deprives it of property without due process of law;

"(13) That said Section 30 affords no warrant or authority for the assessment, extension or collection of said tax, and is illegal, unconstitutional, void and of no force and effect, in that—violates Sections 9 and 10 of Article IX of the Constitution of the State of Illinois, in that it imposes a tax upon the inhabitants of a municipal corporation for local, corporate and mu-

nicipal purposes (fol. 24); (14) That even though said Section 30 should be a valid and constitutional enactment, yet the action of the Board of Review of Cook County in entering upon the assessment books of Cook County, in the Town of South Chicago, an assessment against the complainant for the full amount as found by the Board of Review as aforesaid, or any amount of the net receipts of the complainant as aforesaid was illegal, in excess of its jurisdiction, arbitrary and wholly unauthorized by law.

"(20) Forasmuch, therefore, as this complainant is without remedy in the premises except in a court of equity, where such matters are properly cognizable and relievable, and to the end that the said Patrick J. Carr, County Treasurer of the County of Cook in the State of Illinois, and ex officio County Collector of Cook County in the State of Illinois, who is made a party defendant to this bill, may make full, true and direct answer to the same (but not under oath, the answer under oath being hereby expressly waived); that, upon the final hearing hereof;

"(a) That the Court adjudge and decree that the assessments made against the net receipts of the complainant in the County of Cook and State of Illinois, and in the Town of South Chicago therein, and the taxes extended by the County Clerk of the County of Cook against such assessments, be declared void and held for naught, and said assessments and said extension be set aside and that the defendant, his deputies, clerks, attorneys, agents and servants be restrained and perpetually enjoined from demanding, collecting or (fol. 36) receiving said taxes, or any part thereof, and from levying upon or seizing any of the goods and chattels of the complainant or selling the same, or in any manner attempting to enforce the payment of said taxes, or any part thereof;

"(b) That, if a part only of said taxes should be found to be illegal and void, the relief hereinbefore prayed against the whole of said taxes may be granted as to so much thereof as shall be found by this court to be illegal and void, and in such case, the complainant stands ready and willing, and hereby offers to pay,

so much of said taxes on account of net receipts as may be held by this court to be legal and owing";

III.

Laws of New York.

The laws of New York in addition to provisions for filing papers, for copies of papers, etc., provisions for the issuance of certificates of authority, reciprocal or retaliatory provisions and provisions for fire department taxes, which in substantially the same form, are found in foreign insurance company tax laws of other states, contain the following:

> "Par. 34. Taxation of Foreign Corporations and Foreign Insurers. The capital of an insurance corporation incorporated under the laws of any state or country outside of the United States to the extent employed in the transaction of business in this state, and as determined and certified as prescribed by Section 27 of this chapter, shall be subject to taxation the same as the capital of a like domestic insurance corporation, to be levied, assessed and collected as prescribed by law, at such place in the state as it shall have its principal office. Every health or casualty insurance corporation incorporated by or organized under the laws of any government outside of the United States engaged in the transaction of the business of health or casualty insurance in this state under a certificate of authority from the superintendent of insurance shall, for the privilege of doing business in this state and in addition to any other taxes imposed for such privilege, annually, on or before the first day of April, pay to the superintendent of insurance a tax of two per centum on all premiums received in cash or otherwise by its attorneys or agents in this state during the year ending on the preceding thirty-first day of December, for business done at any time in this state on risks resident therein. Every life insurance corporation incorporated by or organized under the laws of any governments outside of the United

States engaged in the transaction of the business of life insurance in this state under a certificate of authority from the superintendent of insurance shall, for the privilege of doing business in this state, and in addition to any other taxes imposed for such privilege, annually, on or before the first day of April, pay to the superintendent of insurance, a tax of one per centum on all premiums received in cash or otherwise by its attorneys or agents in this state during the year ending on the preceding thirty-first day of December, for business done at any time in this state on risks resident therein.

"Every other foreign insurance corporation or foreign insurer authorized to transact in this state any of the kinds of insurance specified in Sections 110 or 150 of this chapter shall, for the privilege of doing business in this state and in addition to any other taxes imposed for such privilege, annually, on or before the first day of April, pay to the superintendent of insurance a tax of two per centum (or in case of a health or casualty insurance corporation incorporated under the laws of any other state of the United States, a tax of one per centum) upon the amount of all premiums, including reinsurance premiums, upon such insurances (except premiums for insurances and reinsurances on property or risks, other than automobiles, against loss or damage by fire and lightning) which have been received by, or agreed to be paid to, any such foreign insurance corporation or foreign insurer or any attorney or agent thereof, for any such insurance effected, or agreed to be effected, or procured within this state for the year ending on the preceding thirty-first day of December, provided that in the case of insurances, other than marine and inland navigation and transportation insurances, the tax shall be computed only upon the amount of all premiums received by or agreed to be paid to such foreign insurance corporations or foreign insurer or any attorney or agent thereof for insurances and reinsurances upon property or risks located or resident in this state" (Cahill's Consolidated Laws of New York, 1923, Chapter 30, Art. 3, page 1062).

IV.

Laws of New Jersey.

The following are the provisions of the Laws of New Jersey for the taxation of foreign insurance companies as set forth in the 1911-1924 Cumulative Supplement to the Compiled Statutes of New Jersey, Vol. 1, page 1853:

"Par. 99-65. Annual Report of Foreign Companies —Contents—Premium Tax. Every insurance company, other than life, of any other State or foreign country, transacting business in this State, shall, on or before the fifteenth day of February of each year, make to the Commissioner of Banking and Insurance a report, signed and sworn to by an officer of the company, or by its United States manager, if a company of a foreign country, stating the gross amount of premiums and premium deposits and assessments received by such company, and by each agent thereof, on business of the said company in this State for the preceding calendar year, including all premiums and premium deposits and assessments received from other companies, for reinsurance of them, and the amount of premiums and premium deposits and assessments returned to the insured during said year on policies cancelled, and the amount of premiums and premium deposits and assessments paid for reinsurance in other insurance companies of other States or foreign countries, authorized to do business in this State, and the amount of premiums and premium deposits and assessments and so-called dividends of unused or unabsorbed portion of all premiums and premium deposits and assessments returned or credited to policyholders during the year for which the tax is determined, and shall pay to said Commissioner on or before the 15th day of February a tax of two percentum upon such gross amount of premiums and premium deposits and assessments received, less such returned premiums and premium deposits and assessments and such reinsurance premiums and premium deposits, and assessments paid, and less the premiums

and premium deposits and assessments and so-called dividends or unused or unabsorbed portion of all premiums and premium deposits and assessments returned or credited to policyholders during the year for which the tax is determined, which tax shall be in lieu of all other franchise taxes imposed upon said corporation; provided, any taxes hereafter paid to the treasurer of any firemen's relief association of this State by fire insurance companies of other States and foreign countries and their agents, in accordance with the provisions of an act entitled "An act to facilitate the collection from fire insurance companies not organized under the laws of this State, but doing business herein, and their agents and brokers, of certain premiums for the benevolent funds of the several duly incorporated firemen's relief associations of this State," approved May second, one thousand eight hundred and eighty-five, shall be considered a part of the tax payable by such companies under this section, and nothing herein contained shall be construed to repeal, alter or change the provisions of the said recited act.

"And provided, further, that any taxes hereafter paid to the treasurer of any police pension fund by any foreign insurance company or its agents, in accordance with the provisions of an act entitled 'A further supplement to an act entitled "An act to remove the fire and police departments in the cities of this State from political control," approved May second, one thousand eight hundred and eighty-five, and to provide for the establishment, management and distribution of a police pension or retirement fund,' approved April 8th, one thousand nine hundred fifteen, shall be considered a part of the tax payable by such company under this section, and nothing herein contained shall be construed to repeal, alter or change the provision of the said recited act." (L. 1902, p. 433, as amended L. 1903, p. 506, L. 1906, p. 22 (C. S., p. 2857), L. 1916, c. 224, p. 451, L. 1924, c. 208, p. 437.)

The New Jersey statutes also contain the usual reciprocal or retaliatory provisions.

V.

Laws of Ohio.

Sections 5432, 5433, 5434, 5435, 5436 and 5438 of the General Code of Ohio as set forth in Volume 1 of Page's edition are as follows:

"Sec. 5432. Annual Statements of Foreign Insurance Companies. Every insurance company incorporated by the authority of another state or government, in its annual statement to the superintendent of insurance, shall set forth the gross amount of premiums received by it from policies covering risks within this state during the preceding calendar year, without deductions for commissions, return premiums, considerations paid for reinsurance or any deduction whatever. It shall also set forth therein in separate items, return premiums paid for cancellations and considerations, received from other companies for reinsurances in this state during such year. If the superintendent of insurance has reason to suspect the correctness of such statement he may make an examination, at the expense of the state, of the books of such company or its agents for the purpose of verifying them. (R. S. Sec. 2745.)

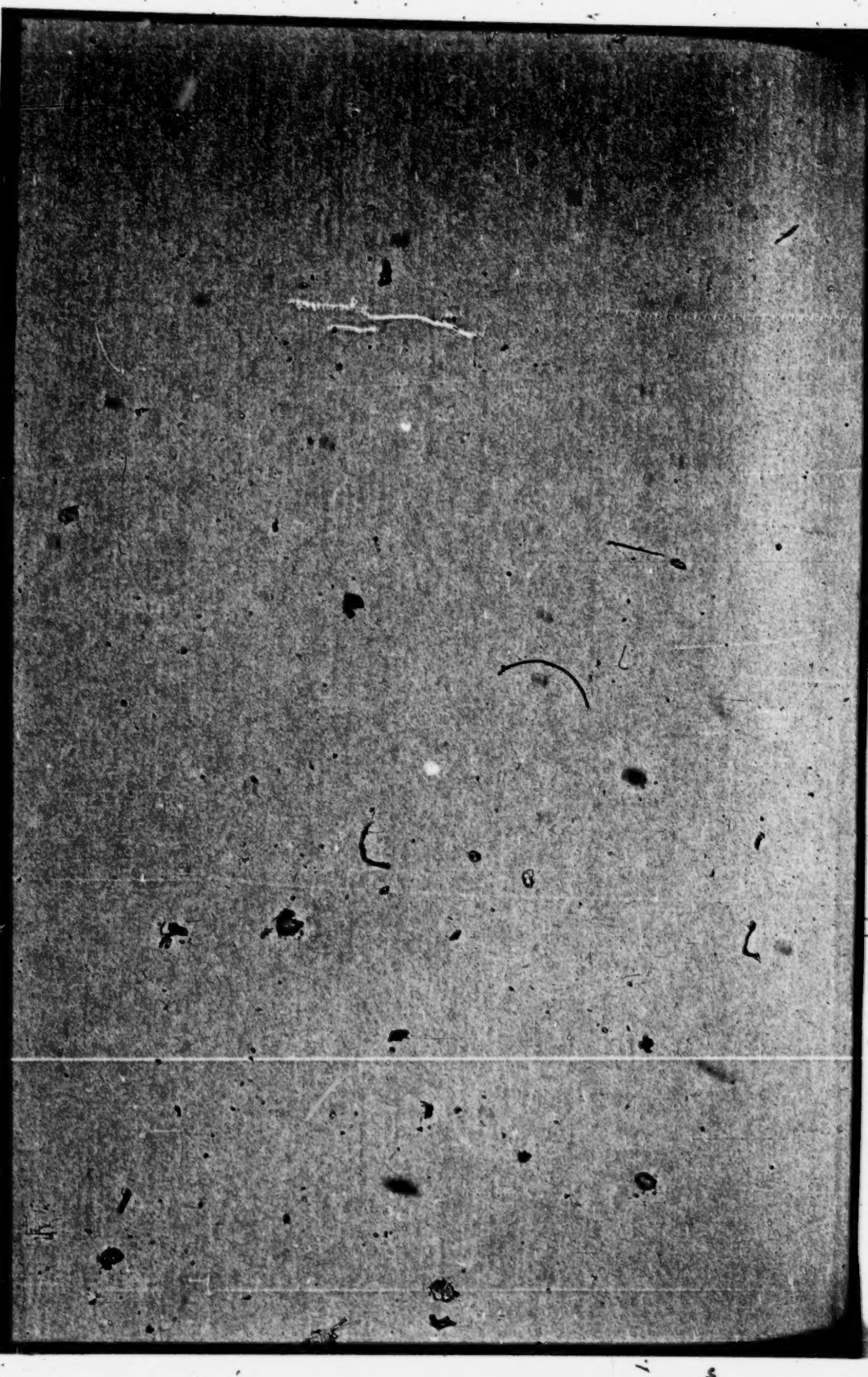
"Sec. 5433. Payment of Tax to Treasurer of State. If the superintendent of insurance finds such report to be correct, prior to the month of November in each year, he shall compute an amount of two and one-half per cent of the balance of such gross amount after deducting such return premiums and considerations received for reinsurances as shown by the next preceding annual statement and charge them to such company as a tax upon the business done by it in this state for the period shown by such annual statement, which amount shall be paid by each such company to the treasurer of state in the month of November next succeeding. All taxes so collected shall be credited to the general revenue fund of the state.

"Sec. 5434. Failure to Pay Tax or Make True Statement. If a company fails or refuses to pay such tax, after a statement thereof has been made and mailed to it, or if the statement required to be made

by it under Section fifty-four hundred and thirty-two is false or incorrect, the superintendent of insurance may revoke the license of such company doing business in this state. Upon failure or refusal to pay the tax, the superintendent of insurance shall certify that fact to the Attorney General, who shall thereupon begin an action against the company in the court of common pleas of Franklin County, or of any other county, as he may elect, to recover the amount of the tax. If such company ceases to do business in this state, it shall thereupon make report to the superintendent of insurance of the gross amount of premiums, not theretofore reported as provided in Section fifty-four hundred and thirty-two, received by it from policies covering risks within this state, prior to such discontinuance of business after deducting return premiums and considerations received for reinsurance, not theretofore so reported, and shall forthwith pay to the superintendent of insurance a like per cent of tax thereon. (R. S. Sec. 2745.)

"Sec. 5436. Retaliatory Provision. If the laws of another state, territory or nation authorize charges for the privilege of doing business therein, or taxes against insurance companies organized in this state, exceeding the charges provided in this chapter, like amounts shall be charged against all insurance companies of such state, territory or nation, doing business in this state, instead of the charges herein provided. (R. S. Sec. 2745.)"

"Sec. 5438. An insurance company or agent legally authorized to transact insurance business in this State shall not write, place or cause to be written or placed a policy, renewal of policy or contract for insurance upon property situated or located in this State, except through a legally authorized agent in this State, who shall countersign all policies so issued and enter the payment of the premiums upon his record. The writing, renewal, placing or causing to be written or placed of a policy of insurance in any other manner or form is a violation of the law providing for the payment of taxes by foreign insurance companies doing business in the State of Ohio as set out and provided in this chapter."



FILE COPY

OCT 11 1933

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 12

CONCORDIA FIRE INSURANCE COMPANY,
APPELLANT,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

NOTE.—THIS COPY OF THE STIPULATION IS SUBSTITUTED FOR THE ABSTRACT THEREOF AS PRINTED ON PAGE 98 OF THE TRANSCRIPT OF RECORD.

DEF'TS' EX. 1—12/17/31.

STATE OF ILLINOIS,
County of Cook, ss:

IN THE CIRCUIT COURT OF COOK COUNTY.

No. B-171,485.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

ALBANY INSURANCE COMPANY OF ALBANY, NEW YORK.

No. B-171,526.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

THE CONCORDIA FIRE INSURANCE COMPANY OF MILWAUKEE, WISCONSIN.

No. B-171,531.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

DUBUQUE FIRE AND MARINE INSURANCE COMPANY OF DUBUQUE, IOWA.

No. B-171,536.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

EUREKA SECURITY FIRE AND MARINE INSURANCE COMPANY OF CINCINNATI, OHIO.

No. B-171,544.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY.

No. B-171,552.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

GIRARD FIRE AND MARINE INSURANCE COMPANY OF PHILADELPHIA, PENNSYLVANIA.

No. B-171,554.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

GLOBE INSURANCE COMPANY OF PENNSYLVANIA, OF PITTSBURGH, PENNSYLVANIA.

No. B-171,589.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

MECHANICS' INSURANCE COMPANY OF PHILADELPHIA, PA.

No. B-171,590.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

MECHANICS AND TRADERS INSURANCE COMPANY OF NEW ORLEANS, LOUISIANA.

No. B-171,597.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

MILWAUKEE MECHANICS' INSURANCE COMPANY OF MILWAUKEE, WISCONSIN.

No. B-171,600.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

NATIONAL-BEN FRANKLIN FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA.

No. B-171,601.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT.

No. B-171,639.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

THE RELIABLE FIRE INSURANCE COMPANY OF DAYTON, OHIO.

No. B-171,665.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

SUPERIOR FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA.

No. B-171,669.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

TRANSCONTINENTAL INSURANCE COMPANY OF NEW YORK, N. Y.

No. B-171,677.

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

UNITED AMERICAN INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA.

STIPULATION.

It is hereby stipulated and agreed, by and between counsel for the respective parties in each of the above entitled causes, that upon any trial of any of the above entitled causes the following facts shall be considered as proved by competent, relevant and material evidence:

I. During each of the years ending April 30, 1923, April 30, 1924, April 30, 1925, April 30, 1926, and April 30, 1927, each defendant in each of the above entitled causes was an insurance company incorporated by the authority of a State or Government other than the State of Illinois, and as such was doing business as a fire, marine and inland navigation insurance company in the County of Cook and State of Illinois, and, through its agents, in each of said years acquired net receipts from the business so conducted.

II. In each of the years 1923 to 1927, inclusive, various non-incorporated foreign associations, various individuals, various so-called "Lloyds," and various domestic fire insurance corporations were lawfully engaged in transacting the business of fire, marine and inland navigation insurance in the State of Illinois, and carrying on said business in direct competition with the defendant and with all other foreign incorporated fire insurance companies then and during said period lawfully transacting the business of fire, marine and inland navigation insurance in the State of Illinois.

III. Said non-incorporated foreign associations, individuals, Lloyds and domestic insurance corporations, aforesaid, during each of said years 1923 to 1927, inclusive, were not assessed for taxation upon their several net receipts covering fire, marine and inland navigation insurance risks assumed by them in Illinois, or upon any property other than their real estate and personal property other than net receipts, like all other property owners and taxpayers; and said foreign stock fire insurance corporations were, in each of said years, assessed for taxation upon their several net receipts derived from such competitive business in Illinois, and were likewise assessed upon tangible personal property and upon real estate owned, if any.

IV. During each of said years 1923 to 1927, inclusive, foreign casualty insurance corporations lawfully carried on in Illinois insurance business of the same character as that carried on by the defendant and by all other foreign fire insurance corporations, including making insurances on automobiles against theft, fire and public liability, and insurances against explosion, sprinkler leakage and other hazards upon which foreign fire, marine and inland navigation insurance companies were authorized to and did make insurances and derive net receipts in Illinois.

V. Said foreign casualty insurance corporations, during each of said years 1923 to 1927, inclusive, were not assessed for taxation upon their several net receipts derived from such competitive business transacted in Illinois during each of said years, or upon any property other than their real estate and personal property other than net receipts, like all other property owners and taxpayers, and such companies were, during said period, acting in direct competition in making insurances in the same territory with the defendant and all other foreign stock fire insurance corporations. Said defendant and other foreign stock fire insurance companies were, during each of said years, assessed for taxation upon the net receipts of such competitive business severally transacted by them in Illinois.

VI. Each defendant above named was duly notified to appear and did appear before the Board of Review of Cook County, on December 15, 1927, for a hearing with respect to the assessment of its net receipts for said years.

VII. Nothing hereinabove contained shall be deemed to preclude either of the parties from offering other evidence upon the trial of any of the above entitled causes, in addition to the facts hereinabove stipulated as true, subject to objections.

JOHN A. SWANSON,
LEWIS H. GERMAIN,
HIRAM T. GILBERT,
Attorneys for the Respective Plaintiffs Above Named.

SILBER, ISAACS, SILBER & WOLEY,
Attorneys for the Respective Defendants Above Named.

Dated Chicago, Dec. 10, 1931.

[Endorsed:] G. No. B-171,485. T. No. —. In the Circuit Court of Cook County. The People of the State of Illinois *vs.* Albany Insurance Company of Albany, New York, and fifteen other insurance companies. Stipulation. Silber, Isaacs, Silber & Woley, Attorneys and Counselors, 208 So. La Salle St. Telephone: Central 6144, Chicago.

(4036)

CORR. TED COPY

P. 7

SUPREME COURT OF THE UNITED STATES.

No. 12.—October Term, 1933.

Concordia Fire Insurance Company, Appellant, *vs.* The People of the State of Illinois. } Appeal from the Supreme Court of the State of Illinois.

[June 4, 1934.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was an action of debt brought by the State of Illinois, in a court of that State, against the Concordia Fire Insurance Company, to recover taxes levied on the net receipts of the latter from its insurance agencies in Cook County, Illinois, during annual periods ending April 30 in each of the years 1923-1927. The defendant interposed a plea of *nil debet*. The cause was heard by the court without a jury under a stipulation entitling the defendant to introduce any evidence which would be admissible in equity under appropriate pleadings, and enabling the court to give effect to equitable principles and render judgment in conformity to the evidence. The court found the issues for the defendant and gave judgment accordingly. The Supreme Court of the State disapproved that judgment and in its stead entered one awarding the plaintiff a recovery of smaller taxes than were claimed for the years ending April 30 in 1923-1926 and of the full tax claimed for the year ending April 30 in 1927. 350 Ill. 365. The defendant then sought and was allowed an appeal to this Court—the ground for the appeal being that the state court overruled the defendant's claim that the state statute, under which the taxes were levied, when construed and applied as sustaining them (it was so construed and applied by that court), conflicts with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The defendant is a Wisconsin insurance corporation and, conformably to its charter and to licenses from Illinois, has been engaged for several years in conducting in Cook County in the latter State the business of insuring against fire, marine and inland

navigation risks and various so-called casualty risks. Its receipts from that business consisted only of premiums received on policies issued.

The taxes in question were levied under § 30 of a statute of March 11, 1869,[1] entitled "An Act to incorporate and to govern fire, marine and inland navigation insurance companies doing business in the State of Illinois". Several sections of the act relate to the creation and regulation of domestic corporations, and others relate to the licensing, taxing, etc., of foreign corporations. Section 30 provides in respect of foreign corporations doing business in the State that in the month of May, annually, "the amount of the net receipts" of their local agencies shall be entered on the local tax lists and be "subject to the same rate of taxation for all purposes, state, county, town and municipal, that other personal property is subject to at the place where located".

Throughout the years 1923-1927, and before, it was the uniform practice of officers and boards engaged in listing and assessing personal property for taxation to treat and list 60% of the fair cash value as the "full value"; and in the years 1923-1926 these officers and boards, pursuant to the direction of a statute of 1919,[2] treated and listed one-half of such "full value" as the "assessed value". By these processes 30% of the fair cash value uniformly was made the basis of personal property taxes in 1923-1926.[3] The same processes were applied in respect of real property. In 1927, before the assessments of that year were completed, the statute directing that 50% of the listed "full value" be taken as the assessed value was repealed,[4] and therefore was not applied in making assessments in that year. But the practice of taking 60% of the fair cash value as the true value was continued and applied in the assessments of that year as it had been in those of earlier years.

In the years 1923-1926 the defendant made returns of its net receipts from fire, marine and inland navigation insurance. The

[1] Ill. Laws 1869, 209, 228; Ill. Laws 1874, 179; Cahill's Ill. Rev. Stat., c. 73, § 159.

[2] Act June 30, 1919; Ill. Laws 1919, p. 727.

[3] Hanover Fire Ins. Co. v. Harding, 327 Ill. 590, 594-595.

[4] Act July 7, 1927; Ill. Laws of 1927, p. 745; Cahill's Ill. Rev. Stat. 1933, c. 120, §§ 328, 329.

amounts so returned were accepted by the assessing officers as correct, but were not scaled down to 60% or further reduced to one-half of 60%, as was done in the assessment of other property. On the contrary, taxes were levied on the full amounts reported in the returns.

In 1927 the defendant made a return of its net receipts from fire, marine and inland navigation insurance, the amount reported being $76,291.00. It arrived at this amount by deducting operating expenses from gross receipts, the former being treated in the computation as 54% of the latter. On this basis its gross receipts were $165,850.00.[5] The amount returned as net receipts was accepted as correct by the board of assessors of the county and 50% thereof was listed by that body as the assessed value. But that assessment, as will appear presently, was not approved by the next superior body, the board of review of the county.

In November, 1927, the defendant was cited by the board of review to appear before it on December 15 at a hearing on a proposed reassessment of the net receipts in the years covered by the returns of 1923-1926, and also on a review of the assessment by the board of assessors of the net receipts in the year covered by the return of 1927. The defendant appeared in response to the citation, and in view of the importance which has been given to the hearing it will be described at some length.

At the hearing the defendant had full opportunity to support and supplement its returns by a further showing respecting its gross receipts and the deductions rightly to be made in determining the net receipts. But it chose to stand on its returns and made no additional showing. It freely conceded that the returns included receipts from fire, marine and inland navigation insurance but not from casualty insurance. And it also conceded that the deductions made by it in computing the net receipts included some items, such as overhead expenses and reinsurance costs, the deduction of which had been and still was the subject of diverging opinions.

A full report of the hearing before the board was produced in evidence at the trial of this cause and is set forth in the record. The report shows that—apart from a controversy over the construction and constitutional validity of the taxing statute—the matters

[5] In one of the briefs this amount is given as $165,670.00.

brought to the board's attention were (1) defendant's failure to include and state separately in its returns the receipts from casualty insurance; (2) defendant's failure to specify with greater particularity the expenses deducted by it in computing the net receipts; (3) a contention that the receipts from casualty insurance should be included in the computation of the taxable net receipts; and (4) a contention that the deductions made for operating expenses were excessive.

One participant in the hearing, who had investigated and studied the matter, made evidential statements to the board tending to show that the defendant's receipts from fire, marine and inland navigation insurance were about 75% of its total receipts, the remainder coming from casualty insurance, and that the operating expenses of an insurance business like that of the defendant in Cook County averaged about 30% of the gross receipts. These statements, although informal, were of such a nature that, under repeated rulings of the Supreme Court of the State, the board could consider them and give some weight to them—particularly as the defendant presented no showing to the contrary beyond referring to its returns which were meager and practically silent on the points to which the statements were directed.

Because of a contention which will be noticed later on it should be stated in this connection that in the hearing before the board the defendant neither claimed that losses paid to policy holders should be deducted in determining net receipts nor presented any showing or statement of the amount of such losses.

After the hearing the board made corrected assessments of the net receipts for the years covered by the returns of 1923-1926; but as the Supreme Court of the State held this action of the board was of no effect, save as it brought the original assessments forward and attached them to the 1927 roll without affecting their original validity or force, the corrected assessments do not require further notice.

Coming to the net receipts for the year ending April 30, 1927, the board fixed their amount at $121,550.00, instead of $76,291.00 as stated in the return; and without scaling or debasing the amount so fixed the board listed it as their assessed value.

The record makes it plain that the board in fixing the net receipts for that year at an amount much larger than was stated in

the return proceeded on the theory and conviction that the receipts from casualty insurance, which were omitted from the return, should be included in computing the taxable net receipts, and that the deductible operating expenses, which the defendant had regarded as 54% of the gross receipts, were only about 30% of such receipts.

In *Hanover Fire Insurance Co.* v. *Harding*, 327 Ill. 590,[6] which preceded the decision in the present case about five years, the Supreme Court of the State in considering and applying § 30 now in question ruled that the reductions, by scaling and debasement, applied in the assessment of other personal property should be applied to net receipts of foreign insurance corporations; and on that ground the court condemned a tax of $7,184.18, where such reductions were not made, and awarded a recovery of $2,155.24, which would have been the tax had the net receipts been reduced like the value of other personal property. In stating the reason for its ruling the court said (pp. 601-602):

"Section 30 provides that 'net receipts shall be subject to the same rate of taxation . . . that other personal property is subject to at the place where located.' The use of the word 'other' indicates that the net receipts were to be considered as personal property and treated the same as other personal property. Clearly, this provision means that not only the percentage of the rate but the basis of the valuation shall be the same. Taxing by a uniform rule requires uniformity not only in the rate of taxation but also uniformity in the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment as well as in the rate per cent of taxation. (Green *v.* L. & I. R. R. Co., 244 U. S. 499; Boyer *v.* Boyer, 113 *id.* 889; Cummings *v.* National Bank, 101 *id.* 153; Exchange Bank *v.* Hines, 3 Ohio St. 1.) Section 30 and the law of 1898[7] should be construed together, and when the net receipts are placed upon the tax list they are to be treated as personal property valuation, and are to be scaled, debased and treated the same as other personal property by the taxing officials."

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[6]This was the second decision of that court in the case. An earlier decision reported in 317 Ill. 366 had been reversed in 272 U. S. 494 and the case had been remanded for further proceedings.

[7]Sections 17 and 18 of the Act of February 25, 1898, Ill. Laws 1898, p. 32, directed assessing officers to take one-third of the listed "full value" as the "assessed value". These sections were amended June 30, 1919, Ill. Laws 1919, p. 727, by changing "one-third" to "one-half".

In that connection the court approvingly quoted from its decision in *People* v. *Cosmopolitan Fire Insurance Co.*, 246 Ill. 442, 448, as follows:

"The net receipts are personal property and are to be listed by the board of assessors and board of review and taxed the same as other property."

In the present case that court in dealing with the original assessments made in 1923-1926, after the returns in those years were received, said (350 Ill. 372):

"Such returns were received and accepted as correct by the assessor, acted upon by the taxing bodies and the taxes extended thereon. The taxes extended were not legal, for the reason that the amounts returned as net receipts were not scaled and debased as the returns of other personal property were in the extension of the taxes."

But while the court ruled that the taxes so extended were not legal, it referred to the stipulation whereby judgment was to be rendered in conformity with the evidence and equitable principles, and held that the plaintiff, while not entitled to recover all that was extended, was entitled to a judgment for what would have been due had the net receipts been "scaled and debased in conformity with the assessments on other personal property" and had the taxes been computed and extended on the resulting assessments.

Respecting the tax on net receipts for the year ending April 30, 1927, that court considered several objections, not material here, which were urged against the action of the board of review and pronounced them not well grounded. It then sustained the assessment as a valid one, held that equity and good conscience required that the tax be paid, and included the full amount in the recovery awarded the plaintiff. Nothing was said in the opinion about the failure of the board of review to scale the net receipts down to 60% of their value, as was done in assessing other property, nor was there mention of anything which could cure that departure from the general practice or render it of no significance. The matter was plainly presented on the record, and the full tax could not have been sustained without resolving it against the defendant. So the conclusion is unavoidable that it was so resolved, although not given distinct mention.

From the outset the defendant has insisted as part of its defense that the taxing act, if construed and applied as sustaining

the taxes in question, denies to it the equal protection of the laws contrary to the prohibition of the Fourteenth Amendment. This appears in the stipulation under which the case was tried, in the opening statement of counsel at the trial, and elsewhere in the record. The Supreme Court, in the opinion, recites that this contention was made, and disposes of it by saying that a like contention was considered and overruled in *Hanover Fire Insurance Co.* v. *Harding*, 327 Ill. 590; and *People* v. *Franklin National Insurance Co.*, 343 Ill. 336.

Of course the question in this Court is whether the act as applied by the state court in this case arbitrarily and prejudicially discriminates against the defendant and in favor of others in circumstances fairly admitting of equal treatment. The particulars in which it is claimed that the act works such a discrimination will be taken up separately.

1. It is said that the act as it was applied to the net receipts of 1927 subjects the personal property of a foreign fire insurance corporation to a tax based on its full actual value whereas other personal property is taxed on a basis of 60% of its value. The complaint is not that the net receipts were valued excessively, but that the value when determined was not debased like that of other personal property. The tax, as extended on the full actual value fixed by the board of review, was $5,895.19. Had that value been debased to 60%, as was the value of other personal property, the tax would have been $3,537.11, making a difference of $2,358.08. The act deals specially and only with the taxation of net receipts of foreign fire, marine and inland navigation insurance corporations. The assessing officers acted in virtue of it and the state court held their action was valid under it. Thus both applied it, and they applied it as subjecting the net receipts of a foreign fire insurance company, by reason of being such, to a tax burden [redacted] greater than that laid on other personal property. No reasonable basis for such a discrimination is suggested and none is perceived. It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 404.

Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given

a particular application and invalid when given another. Here the application which was made of § 30 in respect of the taxation of the net receipts of 1927, i. e., the application made by the assessing officers and sustained by the Supreme Court, brought the section into conflict with the prohibition of that clause. This means that as so applied it is invalid, notwithstanding its validity in some different applications.

By way of excusing the failure to debase it is said that something else was done which was a practical equivalent. But careful consideration of the asserted excusing action shows that it neither did nor could operate as a practical equivalent or rectify the material omission sought to be excused. Effect must be given to the board's recorded action in fixing the net receipts at $121,550. This is the amount which should have been debased to 60% to put the net receipts on a plane with other property.

2. It is said that § 30 works an unreasonable discrimination against the foreign corporations named therein in that it taxes their net receipts without permitting in the computation of such receipts a deduction of paid insurance losses, whereas competing domestic corporations are taxed only on what remains of their receipts on April 1 of each year after insurance losses, as well as operating expenses, are paid. But the defendant is not in a position to press this claim. Neither in its return nor in the hearing before the board of review did it make any showing respecting paid insurance losses or ask that such losses be deducted in arriving at its net receipts. The amount of these receipts—whether one sum or another—was primarily, at least, to be determined by the assessing officers. And as the matter was not presented to them it was not admissible, according to the decision of the Supreme Court, for the defendant to make it a ground for asking the court to reject or revise their finding respecting the amount of the receipts.

3. It is said that § 30 arbitrarily discriminates against foreign fire, marine and inland navigation insurance corporations and in favor of competing domestic corporations, in that it taxes the net receipts of the former, while the latter are not subjected to such a tax or to any equivalent tax. It appears to be conceded that no tax is laid directly on the net receipts of the domestic corporations; but it is denied that those corporations are not subjected to an equivalent tax.

For a long period the Supreme Court of the State ruled that the tax imposed by § 30 was a property tax; later on it ruled that the tax was an occupation or privilege tax; and still later it returned to its first ruling. In *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, this court in sustaining a claim that the section, when applied according to the second ruling, was in conflict with the equal protection clause of the Fourteenth Amendment said (p. 516):

"Under the previous decisions of the Supreme Court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the State, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property, including their net receipts or what they were invested in."

Counsel differ as to whether that statement was necessary to the decision of the case in hand. Be this as it may, the statement recognizes that substantial equality and fair equivalence are important factors in determining the presence or absence of arbitrary discrimination in such situations; and in this respect the statement is in accord with repeated decisions of this Court. Mathematical equivalence is neither required nor attainable; nor is identity in mere modes of taxation of importance where there is substantial equality in the resulting burdens.

By reason of the presumption of validity which attends legislative and official action one who alleges unreasonable discrimination must carry the burden of showing it. This has not been done as respects the claim now being considered. The defendant recognizes that the domestic corporations are subjected to some taxes not laid on the foreign corporations, a capital stock tax apparently being one. But the full situation is not shown; nor is it reflected in the opinion of the Supreme Court or the cases there cited. For aught that appears it may be that taxes not applied to the foreign corporations are laid on the domestic corporations which are the substantial equivalent of the net receipts tax. For these reasons this claim of discrimination must fail.

4. It is said that § 30 requires foreign fire insurance corporations to pay the tax not alone on their net receipts from fire, marine and inland navigation insurance but also on their net receipts from casualty insurance, whereas foreign casualty insurance corporations severally conducting a casualty insurance business in direct competition with the foreign fire insurance corporations are not required to pay a tax on their net receipts or any equivalent tax. The factual premises of this claim are stipulated. The Supreme Court of the State has construed § 30 as taxing the foreign fire insurance companies on their net receipts from casualty insurance,[8] and has held that foreign casualty insurance companies conducting a casualty insurance business are not taxable on their net receipts under § 30 or any other statute.[9] The stipulation shows that all of these foreign corporations are lawfully entitled by reason of licenses, etc., to conduct their respective businesses within the State; that the casualty corporations are conducting the "same character" of casualty insurance business as the fire insurance corporations; that these businesses are competitive; and that the casualty corporations are taxed on such real and tangible personal property as they hold within the State, while the fire insurance companies are taxed not only on their real and tangible personal property but also on their net receipts from casualty insurance.

This statement shows that § 30, as the state court construes and applies it, works a very real and prejudicial discrimination against the fire insurance companies and in favor of the casualty companies in respect of competitive casualty businesses of the same character, conducted in the same way and in the same territory. The companies are all foreign corporations, and all are for present purposes equally within the jurisdiction of the State and subject to her power to tax. There is no basis or reason for making a distinction between them that has any pertinence to the imposition of a property tax such as is in question. The net receipts which are taxed are not different from those which are not taxed; and both come from the same source. Such a discrimination in respect of the taxation of real or tangible personal property obviously would be essentially arbitrary. In principle it is not different with the net receipts. They are property and the tax which § 30 imposes is,

[8] People *v.* Concordia Fire Insurance Co., 350 Ill. 365.

[9] Fidelity and Casualty Company *v.* Board of Review, 264 Ill. 11.

as the state court holds, a property tax. It follows that the section, when construed and applied in the way just described, is in conflict with the equal protection clause of the Constitution. Full support for this conclusion is found in prior decisions.[10]

When the views expressed in this opinion are applied to the judgment under review the result, shortly stated, is as follows: The taxes of 1923-1926, as reduced by the Supreme Court, were only on net receipts from fire, marine and inland navigation insurance, and were computed on amounts obtained by proper scaling and debasement. None of the constitutional objections urged against the taxes of those years is well taken. Therefore as to those taxes the judgment must be affirmed. The tax of 1927 was partly on net receipts from casualty insurance and was also laid on the full amount of the net receipts of that year without first debasing them to 60% as was done with other property. In both of these particulars there was a denial of the equal protection of the laws. Therefore as to that tax the judgment must be reversed. And incidentally the cause must be remanded to the Supreme Court of the State for further proceedings not inconsistent with this opinion.

It is so ordered.

The CHIEF Justice took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[10] Quaker City Cab Co. *v.* Pennsylvania, 277 U. S. 389; Louisville Gas & Electric Co. *v.* Coleman, 277 U. S. 32; Cumberland Coal Co. *v.* Board of Revision, 284 U. S. 23; Iowa-Des Moines National Bank *v.* Bennett, 284 U. S. 239; Royster Guano Co. *v.* Virginia, 253 U. S. 412; Kentucky Finance Corporation *v.* Paramount Auto Exchange, 262 U. S. 544; Power Manufacturing Co. *v.* Saunders, 274 U. S. 490.

SUPREME COURT OF THE UNITED STATES.

No. 12.—October Term, 1933.

Concordia Fire Insurance Company, Appellant, *vs.* The People of the State of Illinois.	On Appeal from the Illinois Supreme Court.

[June 4, 1934.]

Mr. Justice Cardozo, dissenting in part.

I am unable to concur in the opinion of the court to the extent of its holding that the tax upon the net receipts of premiums for casualty insurance is a denial to the appellant of the equal protection of the laws.

The validity of a tax depends upon its nature, and not upon its name. *St. Louis Compress Co.* v. *Arkansas*, 260 U. S. 346, 348; *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 378; *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 38; *Educational Films Corporation* v. *Ward*, 282 U. S. 379, 387.

In the State of Illinois there has long been a usage, reinforced by statute until 1927, whereby property subject to an *ad valorem* tax is to be assessed at 30% or later 60% of its value, and no more. The highest court of that state held for many years that within the meaning of this rule of debasement, the tax upon the net receipts of foreign fire and inland navigation companies was a tax upon property, or at least was to be assessed in the same way. *Chicago* v. *Phoenix Insurance Co.*, 126 Ill. 276; *National Fire Insurance Co.* v. *Hanberg*, 215 Ill. 378, 380; *People* v. *Cosmopolitan Fire Insurance Co.*, 246 Ill. 442, 448. This continued to be the practice till 1921. In that year and for a time afterwards, the Court determined that the tax did not come within the rule of debasement, but was a tax upon a privilege. *People* v. *Kent*, 300 Ill. 324; *People* v. *Barrett*, 309 Ill. 53; *Hanover Fire Insurance Co.* v. *Carr*, 317 Ill. 366. The companies affected by the new ruling attacked the discrimination as unconstitutional, and brought the controversy here. In 1926, this court held that the denial of the 30% debasement to foreign corporations brought about an inequality so gross in comparison with

the burdens of domestic corporations as to vitiate the tax and the statute that imposed it. *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494. Following that decision, the Supreme Court of Illinois receded from the position that it had taken in 1921, and held that there must be a debasement of value as in the case of taxes upon property. *Hanover Fire Ins. Co.* v. *Harding*, 327 Ill. 590, 601; *People* v. *Franklin National Insurance Co.*, 343 Ill. 336.

No descriptive epithet applied to the tax by the Illinois court or any other can transform the essential nature of the tax into something other than it is. *St. Louis Compress Co.* v. *Arkansas, supra; Federal Land Bank* v. *Crosland, supra; Educational Films Corp.* v. *Ward, supra.* No descriptive epithet can make a tax upon the net receipts of the business of the whole year the same as one upon the property located on a particular day of the year within the area of the taxing district, or the same as one upon the capital or income of investments. If the foreign corporations subjected to this tax on net receipts had taken the gross receipts out of the state at once after collection, or had placed them in an insolvent bank with the result that nothing remained when the assessment day arrived, the tax would still have been due without the abatement of a dollar. *Fidelity & Casualty Co.* v. *Board of Review*, 264 Ill. 14. On the other hand, nothing would have been due if no premiums had been collected during the year, though the profits of earlier years were still within the county. The tax, whatever its label, is upon the operations of a business. Generally in the United States, though perhaps not abroad, a tax so imposed is spoken of as an excise. *Stone* v. *Flint Tracy Co.*, 220 U. S. 108, 145; cf. Encyclopaedia of the Social Sciences, vol. V, article "Excise"; Seligman, Essays in Taxation, 9th Edition, pp. 161, 165, 169. It is what it is, no matter what one calls it. It is a tax on net receipts.

This court did not hold in *Hanover Insurance Co.* v. *Harding, supra*, that if the tax was an excise, it would be void for that reason, though the assessment were to be debased. All that was held was that calling it an excise would not save it if the benefit of debasement was withheld in a discriminatory way. By the same token, calling it a property tax does not condemn it if debasement is allowed. The Illinois court did not hold, in retracting the description of a tax upon a privilege, that a tax upon investments is identical with a tax upon the net receipts of the business of the year.

Things so essentially different would not become the same even if a court were to confuse them and speak of them as one. The Illinois court held no more than this, that whatever the differences between the taxes, the two would be viewed as if they were taxes upon property for the purpose of applying the prescribed percentage of debasement. If the tax upon net receipts, including casualty insurance premiums, would not effect a denial of the equal protection of the laws in the event that the Supreme Court of Illinois, while debasing the assessment, had described the tax as an excise, it does not effect such a denial because the court, rightly or wrongly, has described it as something else. *N. Y. Central R. R.* v. *Miller*, 202 U. S. 584, 596. The question still is, what kind of classification is permissible when the yearly net receipts are the subject matter of the tax and the measure of the burden?

Now, plainly, a tax on the net receipts of a business of a particular kind is not condemned as void for the reason that a like tax or an equal one is not laid on the net receipts of every other kind of business. *Bell's Gap R. R. Co.* v. *Penn.*, 134 U. S. 232, 237; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351, 353; *Adams Express Co.* v. *Ohio*, 165 U. S. 223, 228; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114; *Ohio Iron Co.* v. *Lord*, 262 U. S. 172; *Stebbins* v. *Reilly*, 268 U. S. 137, 142; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 159; *Union Bank* v. *Phelps*, 288 U. S. 181. Not even the appellant makes any contention to the contrary. If it did, it would be driven to maintain that the whole statute must fall, and not merely so much as affects the casualty premiums. To say that a tax on the net receipts of one kind of business is void because a like tax is not laid on different forms of business would mean that the net receipts of insurance companies may not be taxed without laying a like tax on manufacturers and merchants. The cases above cited make it clear to the point of demonstration that this is not the law. "The state may tax real and personal property in a different manner." *Bell's Gap Railroad Co.* v. *Penn., supra*; *Ohio Oil Co.* v. *Conway, supra.* "It may impose different specific duties upon different trades and professions, and may vary the rate of excise upon different products." *Ibid.* Nowhere is it intimated that what was approved would have been condemned if there had been in the statute a glossary that gave the tax another name.

With the aid of this analysis the path is cleared to a conclusion. A tax upon the receipts of a business is not invalid as of course

because some forms of business are hit and others are exempt. To bring about that result the assailant of the tax must be able to satisfy the court that the classification had its origin in nothing better than whim and fantasy, a tyrannical exercise of arbitrary power. *Ohio Oil Co.* v. *Conway, supra,* p. 160; *Stebbins* v. *Reilly, supra; Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61, 78. This is the heavy burden that the appellant must sustain. Is it a whimsical and fantastic act to tax foreign fire insurance companies upon all their net receipts, including those derived from casualty premiums, when no such tax is imposed upon the receipts of insurance companies that do a casualty business only? If so, the arbitrary quality of the division must have its origin in the fact that the activities of the one class overlap to some extent the activities of the other. But plainly there is no rule that overlapping classes can never be established in the realm of taxation except at the price of an infringement of the federal constitution. The recognition of such a rule means that a department store may not be taxed on the net receipts of its business unless all the many activities thus brought under a single roof are taxed in the same way when separately conducted. Cf. *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527; *Liggett Co.* v. *Lee,* 288 U. S. 517, 532. There must be a tax on the business of the draper, the jeweler, the shoemaker, the hatter, the carpet dealer, and what not. For the same reason, the proprietor of a retail market dealing in meats and groceries and vegetables and fruits will then escape, at least proportionately, a tax upon receipts if the statute does not cover the business of the shopkeeper who derives a modest income from the sale of peanuts and bananas. There are few taxes upon earnings that would pass so fine a sieve. The rule, if there is any, against the creation of overlapping classes for purposes of taxation is manifestly not one of general validity. The range of its application must depend upon the facts.

Fire insurance companies in Illinois, though organized in other states, have never been allowed to do a general casualty business. It is misleading to argue about them on the assumption that they are appropriately described as casualty insurers. For a long time they were restricted to the risks of fire, lightning and tornadoes, and those of inland navigation and transportation. Act of March 11, 1869; Act of May 31, 1879; Act of June 30, 1885. Then in 1905 (Act of May 16, 1905), they were permitted to insure against

the leakage of sprinklers, pumps, and other apparatus of that order. In 1912 (Act of June 11, 1912), the list was increased by adding the risk of damage to property through the use of motor vehicles, but not the risk of liability for damage to the person. In 1925 (Act of June 30, 1925), there was a revision of the form of the then existing statutes, but with little change of substance. After the revision just as formerly the casualty policies written by the fire companies were confined with negligible exceptions to liability for loss through the use of pumps and sprinklers, and liability for damage to property through the use of motor vehicles. They occupied only a small part of the total casualty business.

The accuracy of this statement is perceived upon a survey of the activities of the casualty companies. These companies insure against bodily injury, disability or death as a consequence of accident. They indemnify merchants and other business men against loss by reason of giving credit to customers. They guarantee against loss by burglary or theft or the breakage of glass. They insure against any hazard resulting from the maintenance or use of automobiles or other vehicles, whether there is personal injury or death or only damage to property. Act of April 21, 1899 as amended by Act of January 30, 1919 and June 28, 1921.

A study of the reports to the Insurance Department of Illinois exposes the overlapping segments in their comparative dimensions. Thus, in 1927, the foreign fire stock-companies of Illinois received premiums from all sources of $68,741,901.34, of which $48,266,624.47 came from fire policies, $680,645.43 from ocean marine insurance, $4,018,503.22 from inland navigation and transportation, $7,866.42 from insurance against earthquakes, $5,743,891.81 from tornado policies, $171,833.15 from insurance against damage by hail, $327,933.61 from riot insurance, $48,414.68 from miscellaneous policies; and $9,476,188.55 from the two fields where the business of fire companies and casualty companies overlap, i. e., motor vehicle property damage and sprinkler leakage ($9,207,980.43 for the one and $268,208.12 for the other). 60th Annual Insurance Report, part I, pp. 96-105. During the same year the foreign casualty companies received premiums of $7,384,454.82 from accident and health policies, $12,728,070 from workmen's compensation insurance, $3,274,293.63 from fidelity insurance premiums, $7,879,541.48 from automobile liability insurance, exclusive of property damage, $3,047,350.53 from liability insurance

not connected with automobiles, $3,957,757.69 from insurance against burglary and theft, $4,371,869.46 from surety bonds, $1,961,445.08 from plate glass insurance, $442,020.20 from steam boiler insurance, $161,862.91 from engine and machinery insurance, $370,040.02 from credit insurance, $111,164.20 from property damage not connected with motor vehicles, $22,676.10 from insurance of live stock, $794,119.43 from miscellaneous policies, and finally $3,199,397.92 from motor vehicle policies covering damage to property and $44,267.48 from sprinkler damage insurance. The total premiums from all sources were $50,679,141.98. 60th Annual Insurance Report, part III, pp. 79-92.

This comparison makes it clear that the business of fire insurance companies as carried on in Illinois is essentially a different one from the business generally known as that of casualty insurance, though the spheres coincide for the space of a small segment. A phase or department of one business may be akin to a phase or department of another, and still the kindred branches may bear unequal taxes. Coincidence of some of the parts is not enough unless the parts are so many as to determine the identity of the whole. The vice of any different principle may be known from its consequences. The drug store of today supplies many things besides medicines and surgical appliances. It has a counter where sandwiches and salads and ice cream and many other edibles are furnished to its customers. If a tax were to be laid upon the earnings of a drugstore, the acceptance of the appellant's argument would drive us to a holding that the receipts from the sale of edibles must be excluded from the reckoning in the absence of a like tax upon the proprietors of restaurants. Dealers of ready made clothing have a department of their business in which clothes are made to order. The appellant would have us say that the earnings from that department are exempt under the constitution from a tax upon receipts unless a like tax is laid upon the earnings of the merchant tailor. The legislature in that view may no longer classify the forms of business with an eye to a composite group of uniformities and differences. There must be a segregation of forms of business into their constituent activities, which, to the extent that there is identity, must be taxed for any one group as they are taxed for any other. Immunity from tax laws of unequal operation has never until now been pressed to that extreme. *Armour & Co.* v. *Virginia*, 246 U. S. 1, 6; *Armour Packing Co.* v.

Lacy, 200 U. S. 226; *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Pacific Express Co.* v. *Seibert*, *supra*; *State Board of Tax Commissioners* v. *Jackson*, *supra*; *N. Y. ex rel. N. Y. and Albany Lighterage Co.* v. *Lynch*, 288 U. S. 590; *Puget Sound Power & Light Co.* v. *City of Seattle*, 291 U. S. —; *A. Magnano Co.* v. *Hamilton*, 291 U. S. —.

By the very law of their being, companies whose principal business is to provide insurance against fire, but who provide casualty insurance in a very narrow field, are in a class of their own, with capacities and opportunities essentially diverse from those of companies who are incompetent to provide insurance against fire, but who do insure against almost every other imaginable risk. The state is not called upon to explain the reasons for taxing the members of the one class more heavily than it does the members of the other. The burden is on the appellant who would strike the statute down, and not on the state which invokes the presumption of validity. *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 410; *Detroit Bridge Co.* v. *Tax Board*, 287 U. S. 295, 297. "As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman & Young, Inc.* v. *Hartford Fire Insurance Co.*, 282 U. S. 251, 257; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 283; *Williams* v. *Mayor*, 289 U. S. 36, 42. Here the foundation fails, and with it the assault.

Nothing that was determined in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, is at war with this conclusion. There the business done by the taxpayer was the same as that done by others to whom an exemption was allowed. Here they are not the same, though at places they overlap.

For many years the fire insurance companies in Illinois were without power to write a policy unless the hazards were those of fire or of inland navigation. When the power was conferred upon them to cover risks of other kinds, a statute gave them notice that they must pay taxes to the county upon the net earnings of their business from whatever source derived. They were free to use the new privilege or to reject it as they pleased. They accepted it *cum onere* if they accepted it at all.

Mr. Justice BRANDEIS and Mr. Justice STONE join in this opinion.